No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

LEONARD SCHAITMAN
MATTHEW M. COLLETTE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether confidential communications between Indian Tribes and the Department of the Interior, in connection with the federal government's performance of its trust responsibility to protect and manage tribal water rights, are "intra-agency" documents that may be protected from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	14
Conclusion	29
Appendix A	1a
Appendix B	31a
Appendix C	33a
Appendix D	72a

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 373 U.S. 546 (1963)	23
CNA Fin. Corp. v. *Donovan*, 830 F.2d 1132 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988)	4-5
Colorado River Conservation Dist. v. *United States*, 424 U.S. 800 (1976)	23
Department of the Air Force v. *Rose*, 425 U.S. 352 (1976)	18
Dow Jones & Co. v. *Department of Justice*, 917 F.2d 571 (D.C. Cir. 1990)	4, 5
FBI v. *Abramson*, 456 U.S. 615 (1982)	18
Formaldehyde Inst. v. *Department of Health & Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989)	4
Government Land Bank v. *GSA*, 671 F.2d 663 (1st Cir. 1982)	5
Heckman v. *United States*, 224 U.S. 413 (1912)	17
Hoover v. *United States Dep't of the Interior*, 611 F.2d 1132 (5th Cir. 1980)	4
Idaho v. *Oregon*, 444 U.S. 380 (1980)	26
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989)	18

Cases—Continued: Page

Kissinger v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980) 17
Lead Indus. Ass'n v. *OSHA*, 610 F.2d 70 (2d Cir. 1970) 4
Morton v. *Mancari*, 417 U.S. 535 (1974) 15
NLRB v. *Robbins Tire & Rubber*, 437 U.S. 214 (1978) 17-18
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975) 3
National Farmers Ins. Cos. v. *Crow Tribe of Indians*, 471 U.S. 845 (1985) 6
Nevada v. *United States*, 463 U.S. 110 (1983) 23, 24, 25
Oklahoma Tax Comm'n v. *Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) 15
Parravano v. *Babbit*, 70 F.3d 539 (9th Cir. 1995), cert denied, 518 U.S. 1016 (1996) 11
Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 (1968) 26
Public Citizen, Inc. v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997) 4, 21, 22
Renegotiation Bd. v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974) 17
Ryan v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980) 4, 5, 19
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 16
Seminole Nation v. *United States*, 316 U.S. 286 (1942) 6, 14, 17
Soucie v. *David*, 448 F.2d 1067 (D.C. Cir. 1971) 4
United States v. *Adair*, 723 F.2d 1394 (9th Cir.), cert. denied, 467 U.S. 1252 (1984) 8, 9
United States v. *American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980) 24
United States v. *Candelaria*, 271 U.S. 432 (1926) 17
United States v. *Cherokee Nation*, 480 U.S. 700 (1987) 6, 14

Cases-Continued: Page

United States v. *McPartlin*, 595 F.2d 1321 (7th Cir.), cert. denied, 444 U.S. 833 (1979) 23
United States v. *Minnesota*, 270 U.S. 181 (1926) 17
United States v. *Mitchell*, 463 U.S. 206 (1983) 6, 14
United States v. *Oregon*, 44 F.3d 758 (9th Cir. 1994), cert denied, 516 U.S. 943 (1995) 9, 23
United States v. *Powers*, 305 U.S. 527 (1939) 23
United States v. *Schwimmer*, 892 F.2d 237 (2d Cir. 1989) 23
United States v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984) 3, 19, 24
United States v. *White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) 10
United States Dep't of Justice v. *Julian*, 486 U.S. 1 (1988) 5, 20-21
Winters v. *United States*, 207 U.S. 564 (1908) 23
Wolfe v. *Department of Health & Human Servs.*, 839 F.2d 768 (D.C. Cir. 1988) 19

Treaty, statutes and regulation:

Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 107 8
Act of Aug. 13, 1954, ch. 732, § 1, 68 Stat. 718 (25 U.S.C. 564 *et seq.*) 8
Freedom of Information Act:
5 U.S.C. 551(1) 3
5 U.S.C. 552 (1994 & Supp. IV 1998) 2
5 U.S.C. 552(b) (1994 & Supp. IV 1998) 2
5 U.S.C. 552(b)(5) 2
Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450a(b) 16
Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (25 U.S.C. 566 *et seq.*) 8
McCarran Amendment, 43 U.S.C. 666 9

Statutes and regulation—Continued:	Page
Presidential Records Act of 1978, 44 U.S.C. 2201 *et seq.*	21
25 U.S.C. 1a	7
25 U.S.C. 162a(d)	6
25 C.F.R. Subch. H, Pts. 150-181	7
Miscellaneous:	
Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. Off. Legal Counsel 481 (1982)	3
Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998)	6, 7
H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966)	18, 19
Restatement (Second) of Trusts (1959)	15
S. Rep. No. 813, 89th Cong., 1st Sess. (1965)	18

In the Supreme Court of the United States

No.

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of the Interior and the Bureau of Indian Affairs, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 189 F.3d 1034. The decision of the district court (App., *infra*, 31a-32a) adopting the findings and recommendation of the magistrate judge is unreported. The findings and recommendation of the magistrate judge (App., *infra*, 33a-71a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. A petition for rehearing was denied

on December 22, 1999 (App., *infra*, 72a-73a). On March 10, 2000, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including April 20, 2000. On April 10, 2000, Justice O'Connor further extended the time for filing to and including May 20, 2000. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. IV 1998), generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b) (1994 & Supp. IV 1998), however, identifies several categories of records that are exempt from compelled disclosure. This case involves the application of FOIA Exemption 5, 5 U.S.C. 552(b)(5), which authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Exemption 5 "codifies the traditional common law privileges afforded certain documents in the context

of civil litigation and discovery." *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 490 (1982); see *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) ("Exemption 5 simply incorporates civil discovery privileges."); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) ("It is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context."). Those privileges include the "deliberative process" privilege, a privilege unique to the government that protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* at 150 (internal quotation marks omitted). Exemption 5 also applies to records covered by "the attorney-client and attorney work-product privileges generally available to all litigants." *Id.* at 149. This case principally involves the application of Exemption 5 to documents that were created outside the government but were provided to federal agency officials at the agency's request and were considered by the government in its internal deliberations.[1]

For purposes of the FOIA, the term "agency" is defined to mean (with exceptions not relevant here) "each authority of the Government of the United States." 5 U.S.C. 551(1). The courts of appeals that have considered the question have uniformly concluded that at least under some circumstances, a document pre-

---

[1] Six of the seven documents currently at issue fit that description. The seventh was prepared within the agency and was then provided to persons outside the government from whom the agency sought advice and assistance concerning its performance of official duties.

pared outside the government may qualify as an "intra-agency memorandum[]" within the meaning of Exemption 5.

The District of Columbia Circuit has developed the most extensive body of case law, beginning with its decision in *Soucie* v. *David*, 448 F.2d 1067 (1971), in which the court stated:

> The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

Id. at 1078 n.44; see also, *e.g.*, *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997) ("[R]ecords of communications between an agency and outside consultants qualify as 'intra-agency' for purposes of Exemption 5 if they have been 'created for the purpose of aiding the *agency*'s deliberative process.'") (quoting *Dow Jones & Co., Inc.* v. *Department of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990)); *Formaldehyde Inst.* v. *Department of Health & Human Servs.*, 889 F.2d 1118, 1122-1125 (D.C. Cir. 1989); *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-791 (D.C. Cir. 1980); *Hoover* v. *United States Dep't of the Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980); *Lead Indus. Ass'n* v. *OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); cf. *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1159-1162 (D.C. Cir. 1987) (applying same principle to discovery request

in administrative adjudication), cert. denied, 485 U.S. 977 (1988).

This Court has not yet had occasion to decide whether, and to what extent, Exemption 5 may cover documents received from (or furnished to) persons outside the government. In *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988), three Members of this Court endorsed the approach to Exemption 5 taken by the courts of appeals:

> [T]he most natural meaning of the phrase "intra-agency memorandum" is a memorandum that is addressed both to and from employees of a single agency—as opposed to an "inter-agency memorandum," which would be a memorandum between employees of two different agencies. The problem with this interpretation is that it excludes many situations where Exemption 5's purpose of protecting the Government's deliberative process is plainly applicable. Consequently, the Courts of Appeals have uniformly rejected it, holding the "intra-agency memorandum" exemption applicable to such matters as information furnished by Senators to the Attorney General concerning judicial nominations, see *Ryan* v. *Department of Justice*, 199 U. S. App. D. C. 199, 207-209, 617 F.2d 781, 789-791 (1980), and reports prepared by outside consultants, see *Government Land Bank* v. *GSA*, 671 F.2d 663, 665 (CA1 1982). It seems to me that these decisions are supported by a permissible and desirable reading of the statute. It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred

> capacity other than on behalf of another agency—*e. g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.

Id. at 18 n.1 (Scalia, J., joined by White & O'Connor, JJ., dissenting). The Court in *Julian* did not address the question whether the relevant documents were "inter-agency or intra-agency" records within the meaning of Exemption 5, see *id.* at 11 n.9, since it concluded that the documents would be routinely discoverable in civil litigation and therefore would not be covered by the Exemption in any event, see *id.* at 11-14.

2. This Court has frequently recognized that "Indian tribes occupy a unique status under our law." *National Farmers Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). "Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection." Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998). Accordingly, the United States is subject to a trust responsibility to protect the natural resources of Indian Tribes. See, *e.g.*, *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987); *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942); 25 U.S.C. 162a(d). The relationship between the federal government and the Tribes with respect to Indian resources has been analogized to the relationship existing under a common law trust, with the United States as trustee, the Indian Tribe as beneficiary, and the property and natural resources as the trust corpus. See *Mitchell*, 463 U.S. at 225. The Bureau of Indian Affairs (BIA), an agency located within the Department of the Interior (DOI), is the federal agency having primary responsibility for administering

land and water held in trust for the Indian Tribes. 25 U.S.C. 1a; 25 C.F.R. Subch. H, Pts. 150-181.

In November 1993, the Secretary of the Interior directed all bureaus and offices within the agency to "be[] aware of the impact of their plans, projects, programs or activities on Indian trust resources," and "to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect * * * if their evaluation reveals any impact on Indian trust resources." C.A. E.R. 252. In April 1994, President Clinton issued a memorandum imposing similar requirements on all executive departments and agencies. *Id.* at 250-251. In May 1998, the President issued an Executive Order that directs federal agencies to "establish regular and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices" that affect tribal governments. Exec. Order No. 13,084, 63 Fed. Reg. at 27,655.

The Secretary's November 1993 directive has been incorporated into the Departmental Manual governing the DOI. The Manual states that "[i]t is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety." C.A. E.R. 254. Accordingly, the Manual directs that "[a]s part of the planning process, each bureau and office must identify any potential effects on Indian trust resources" in order to ensure that such effects can "be explicitly addressed in the planning/decision documents." *Id.* at 255. The Manual further provides that

> [i]n the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s). * * * Information received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s).

Ibid.

3. This case principally involves documents submitted to petitioner BIA by the Klamath Indian Tribes. Pursuant to an 1864 treaty, the Klamath Tribes retain fishing, hunting, and gathering rights on lands that were previously part of the former Klamath Indian Reservation in Oregon. See Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 107.[2] In *United States* v. *Adair*, 723 F.2d 1394 (9th Cir.), cert. denied, 467 U.S. 1252 (1984), the court of appeals held that the hunting and fishing rights reserved to the Klamath Tribes by the 1864 treaty

[2] In 1954, the Klamath Indian Reservation in Oregon was terminated pursuant to the Klamath Termination Act, see Act of Aug. 13, 1954, ch. 732, § 1, 68 Stat. 718 (25 U.S.C. 564 *et seq.*). Under the 1954 Act, the Klamath Tribes' reservation lands were disposed of to private parties, individual Indians, and to federal agencies, but the Tribes' hunting, fishing, and gathering rights remained intact. See, *e.g.*, *United States* v. *Adair*, 723 F.2d 1394, 1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984). In 1986 the Klamath Tribes were restored as a federally recognized tribal entity. See Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (25 U.S.C. 566 *et seq.*).

carry with them an implied reservation of water rights, "with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights." *Id.* at 1415; see *id.* at 1408-1415. The court in *Adair* further explained that

> the right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive. The holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent other consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams['] waters below a protected level in any area where the non-consumptive right applies.

Id. at 1411 (citation omitted).

4. Although federal reserved water rights for an Indian Tribe derive from and are defined by federal law, the adjudication of the existence and quantification of such reserved water rights may take place in the context of a general stream adjudication in state court, pursuant to the waiver of sovereign immunity in the McCarran Amendment, 43 U.S.C. 666. The State of Oregon has established a statutory procedure to determine the surface water rights of all claimants in the Klamath River Basin in Oregon. See *United States* v. *Oregon*, 44 F.3d 758, 764 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995). In *United States* v. *Oregon*, the court of appeals held that the waiver of federal sovereign immunity contained in the McCarran Amendment applied to the Oregon proceeding. 44 F.3d at 763-770.

The United States is thus a party to the Oregon adjudication and, in addition to asserting water rights on its own behalf, has an affirmative obligation to assert water rights claims on behalf of the Klamath Tribes.

See *United States* v. *White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986); C.A. E.R. 148. The BIA has therefore engaged in extensive consultation with the Tribes, including the exchange of legal analyses and theories regarding the scope of the claims submitted by the United States on behalf of the Tribes. *Id.* at 149-150. The Department of Justice, on behalf of the BIA, then submitted claims for the benefit of the Klamath Tribes. The adjudication remains pending.

5. The Bureau of Reclamation (BOR), an agency located within the DOI, administers the Klamath Irrigation Project (Klamath Project). The Klamath Project uses water from the Klamath River Basin to irrigate over 200,000 acres in Klamath County, Oregon, and two northern California counties, primarily for agricultural purposes. App., *infra*, 14a, 35a; C.A. E.R. 273. In 1995, DOI began efforts to develop the Klamath Project Operations Plan (KPOP or Operations Plan), a long-term operations plan for the Project. App., *infra*, 14a, 35a.

In connection with those efforts, DOI entered into a memorandum of agreement (MOA) with the Klamath, Hoopa Valley, Karuk, and Yurok Tribes (collectively Klamath Basin Tribes). See C.A. E.R. 115-120. Consistent with the President's memorandum of April 1994 and the Secretary's directive of November 1993 (see pp. 6-7, *supra*), the MOA recognized that "[t]he United States Government has a unique legal relationship with Native American tribal governments." C.A. E.R. 115. The MOA further recognized that "[w]ith respect to the development of the KPOP, the government-to-government relationship" between the United States and the Tribes requires "[a]ssessment, in consultation with the Tribes, of the impacts of the KPOP on Tribal trust resources." *Id.* at 116. The MOA observed that "[t]his involvement of the Tribes is a major means of assuring

that the development of the KPOP reflects the United States' trust obligations and Tribal rights." *Id.* at 118.

6. Respondent is a non-profit association consisting of Klamath Project irrigators. In 1996, respondent filed a series of FOIA requests with the BIA, seeking access to all communications between the BIA and the Klamath Basin Tribes regarding water resources issues. App., *infra*, 3a, 16a-19a, 37a-38a. The agency released several documents, but it withheld others as exempt under the attorney-work-product and deliberative-process privileges protected by FOIA Exemption 5. Plaintiff then brought this action against the DOI and the BIA.

By the time that the district court ruled in this case, only seven documents remained in dispute. See App., *infra*, 3a, 41a. Three of the documents involve the KPOP; three involve the Oregon adjudication; and the seventh is relevant to both proceedings. See *id.* at 41a-49a. Six of the documents were prepared by the Klamath Tribes or their representative and were submitted to the BIA (or, in one instance, to DOI's Regional Solicitor, see *id.* at 45a) at the agency's request. See *id.* at 41a-49a. The seventh document was prepared by a BIA official and was provided to attorneys for the Klamath and Yurok Tribes. *Id.* at 43a-44a.[3]

The case was referred to a magistrate judge, who recommended that the government's summary judgment motion be granted on the ground that the docu-

---

[3] The Ninth Circuit has repeatedly held that the Yurok Tribe has fishing rights in the Klamath Basin. See, *e.g.*, *Parravano* v. *Babbitt*, 70 F.3d 539 (1995), cert. denied, 518 U.S. 1016 (1996). Although no court has adjudicated the Yurok Tribe's water rights, the view of the United States is that under the reasoning of *Adair* and other precedents of the Ninth Circuit and this Court, the Tribe has instream flow rights sufficient to support its fishing rights.

ments in question are protected by Exemption 5. App., *infra*, 33a-71a. The magistrate judge found

> that all the documents in question qualify as inter-agency or intra-agency documents under the "functional test". All the documents played a role in the agency's deliberations with regard to the current water rights adjudication and/or the anticipated [KPOP]. Most of the documents were provided to the agency by the Tribes at the agency's request. Disclosure of these documents would expose the agency's decision-making process and discourage candid discussion within the agency undermining the agency's ability to function.

Id. at 59a. The magistrate judge found that all of the documents were covered by the deliberative-process privilege, *id.* at 56a-61a, and that two of the documents (involving the Oregon adjudication) were covered by the attorney-work-product privilege as well, *id.* at 61a-65a. The district court adopted the findings and recommendation of the magistrate judge. *Id.* at 31a-32a.

7. The court of appeals reversed. App., *infra*, 1a-30a. The court acknowledged that the District of Columbia Circuit has adopted a "functional" approach to Exemption 5, under which a document generated outside the government may under some circumstances be regarded as an "intra-agency" memorandum. *Id.* at 6a-8a (see pp. 4-6, *supra*). The court declined to decide whether that approach to Exemption 5 is appropriate. App., *infra*, 8a. Rather, the court found it dispositive that "the Tribes with whom the Department has a consulting relationship have a direct interest in the subject matter of the consultations. The development of the KPOP and the Oregon water rights adjudication will affect water allocations to the Tribes as well as those to members of the Association." *Ibid.* The court

therefore concluded that because "the matters with respect to which [DOI] sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest," *id.* at 9a, the Tribes' submissions to the BIA could not properly be regarded as "inter-agency or intra-agency" documents, *id.* at 10a. The court stated that "[t]o hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the [DOI]." *Ibid.*

Judge Hawkins dissented. App., *infra*, 11a-30a. He explained:

> Where the Bureau and Department are, by law, required to represent the interests of Indian Tribes, the majority's holding stands as a barrier to that representation. The majority implies that status as a federally recognized Indian Tribe, and the U.S. government's trust responsibilities to the Tribes, create not a cooperative, but an adversarial relationship between the government and the Tribe, and thus FOIA can be used to destroy any opportunity for "open and honest" consultation between them. * * * I simply cannot agree with a notion I think so fundamentally wrong.

Id. at 12a-13a. Judge Hawkins also stated that "[t]he affidavits from Department and Bureau employees, accepted by the court below, confirm that these communications spring from a relationship that remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the expertise of the Tribes, rather than opposing them." *Id.* at 25a-26a.[4]

---

[4] Judge Hawkins also observed that the majority's conception of the relationship between the Tribes and the agency in this case

REASONS FOR GRANTING THE PETITION

In managing and protecting the property of Indian Tribes, the federal government acts as a trustee and is bound by the high fiduciary standards that the trustee's role entails. Under established principles, a trustee is required, *inter alia*, to maintain the confidentiality of information acquired in the trust relationship if disclosure of the information would disserve the beneficiary's interests. The court of appeals in this case, however, construed the FOIA as effectively precluding federal officials from complying with that fundamental trust obligation. Because the court of appeals' decision threatens substantial disruption of the trust relationship between the United States and Indians, and in light of the broad range of property located within the Ninth Circuit that the United States holds in trust for Indian Tribes or individual Indians, review by this Court is warranted.

1. The documents at issue in this case were intended to assist the BIA in performing its responsibility to manage and protect tribal water rights held in trust by the United States. "It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987); accord, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983) ("[A] fiduciary relationship necessarily arises when the Government assumes * * * elaborate control over * * * property belonging to Indians."); see *id.* at 224-226. The government's "conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942).

Under basic trust principles, "[t]he trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts § 170 cmt. s (1959). The "direct interest" test announced by the court of appeals permits use of the FOIA as a means by which federal officials may be compelled to breach that obligation on a regular basis. Because Indian Tribes will always have a "direct interest" in the government's performance of its fiduciary responsibilities with respect to resources that the United States holds in trust for the Tribe, the court's holding effectively precludes the use of Exemption 5 to shield the confidentiality of communications between the Tribes and the BIA regarding trust property.

The ability of the United States to receive candid advice and information from Tribes is integral to the government's performance of its trust responsibilities.[5]

"fails to recognize or address that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to 'resolve.'" App., *infra*, 23a n.4.

[5] For over half a century, federal policy has favored a broad right of tribal self-government and self-determination. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 553 (1974) (explaining that "Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies" because "[t]he overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests."); *Oklahoma Tax Comm'n* v. *Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (relevant federal statutes "reflect Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal

Consistent with that understanding, DOI's Departmental Manual mandates consultation with Tribes whenever their trust resources may be affected by the Department's actions. C.A. E.R. 255. The Manual further provides that "[i]nformation received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position." *Ibid.*

Under the court of appeals' decision, however, Tribes and individual Indians who continue to provide the government with advice and information concerning trust resources may receive representation that falls short of traditional fiduciary standards, since federal officials will be unable to guarantee the confidentiality that a trust relationship ordinarily entails. Alternatively, Tribes and individual Indians may decline to

---

self-sufficiency and economic development") (internal quotation marks omitted); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62 (1978). In the Indian Self-Determination and Education Assistance Act, for example,

> Congress declare[d] its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. 450a(b). Consultation with Tribes regarding the United States' performance of its trust responsibilities substantially furthers the federal policy favoring tribal self-government and self-determination, by ensuring that tribal perspectives are fully considered by federal officials charged with managing and protecting property held in trust for the Tribes.

furnish candid assessments and proposed strategies for protecting their resources. But in that event, federal officials will be deprived of critical expertise and the beneficiaries' perspective concerning trust resources that are vital to the well-being of the Indians; they may be forced to duplicate pertinent research at government expense; and their ability to manage and protect the trust property will be compromised. Under either scenario, the United States will be unable to satisfy the "exacting fiduciary standards," *Seminole Nation*, 316 U.S. at 297, that have historically governed its relationships with tribal governments; a wedge will be driven between the United States and the beneficiaries in whose interest the United States must act, and the historical relationship of trust and confidence between the United States and the Indians will be undermined.

The harm caused by the court of appeals' decision, it should be emphasized, is not visited upon the Tribes and tribal members alone. This Court has repeatedly recognized the substantial public and governmental interest in the United States' fulfillment of its trust responsibilities regarding Indian property. See, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 443-444 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Heckman* v. *United States*, 224 U.S. 413, 437 (1912). The court of appeals' decision in this case significantly disserves those public and governmental interests by impairing the ability of the responsible officials of the United States government to perform that important federal function.

This Court has consistently expressed "reluctance to construe the FOIA as silently departing from prior longstanding practice." *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 154 (1980) (citing *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 22 (1974), and *NLRB* v. *Robbins*

Tire & Rubber, 437 U.S. 214, 237 (1978)). The court of appeals' construction of Exemption 5, however, effectively compels federal officials to breach an obligation of confidentiality that has traditionally been regarded as integral to any trust relationship. Absent the clearest evidence of congressional intent, the FOIA should not be read to require such a departure from traditional practice. As we explain below, no such evidence exists. To the contrary, the text and history of the FOIA, and judicial decisions interpreting the Act, reflect a recognition that FOIA's general rule of agency disclosure should not be applied in so rigid a fashion as to subvert the effective performance of governmental functions.

2. Although the FOIA reflects "a general philosophy of full agency disclosure," *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)), this Court "has recognized that the statutory exemptions are intended to have meaningful reach and application," *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Because "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information," it provided "specific exemptions under which disclosure may be refused." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982). Congress thereby sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966) (H.R. Rep. No. 1497); see *John Doe Agency*, 493 U.S. at 152. Congress recognized in particular that "a full and frank exchange of opinions would be impossible" if all internal agency communications were made public, and that "advice from staff assistants and the exchange of ideas among agency personnel would

not be completely frank if they were forced to operate in a fishbowl." H.R. Rep. No. 1497, at 10 (internal quotation marks omitted); see *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984) (legislative history of Exemption 5 "recognizes a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations"); *Wolfe* v. *Department of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc).

It is thus well established that the indiscriminate release of deliberative materials prepared by federal officers and employees and retained by the agency would be incompatible with vigorous and effective government. At least under some circumstances, public disclosure of documents that are created by persons outside the federal government, and then provided to agency officials at the agency's request, may cause similar disruption of governmental processes. In recognition of that fact, the courts of appeals have repeatedly sustained the application of Exemption 5 to materials prepared by outside consultants or advisors. Recognizing that "Congress apparently did not intend 'inter-agency' and 'intra-agency' to be rigidly exclusive terms," *Ryan* v. *Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980), those courts have applied a "functional test" that focuses on the role a document plays in the agency's performance of its assigned functions, and on whether the document's public disclosure would result in harms comparable to those caused by release of agency-created records. See pp. 4-6, *supra*.

In the instant case, the court of appeals concluded that those decisions were inapposite—*i.e.*, that the materials at issue here could not be regarded as "intra-agency" documents within the meaning of Exemption 5—because "the Tribes with whom the [DOI] has a

consulting relationship have a direct interest in the subject matter of the consultations." App., *infra*, 8a. That reasoning is deeply flawed. As we have explained above, a duty to maintain the confidentiality of information acquired in administering a trust where disclosure would disserve the beneficiary's interests has traditionally been an integral feature of the trustee's responsibilities. The beneficiary's interest in the trust property, and the trustee's duty to protect that interest, form the essence of the trust relationship. To put it another way, the trustee's distinct responsibilities run precisely to those persons having an interest in the trust corpus. It is therefore perverse to treat the Klamath Tribes' "direct interest" in the allocation of water within the Klamath Basin as a ground for public disclosure of communications made by the Tribes to the government when acting in fulfillment of the United States' responsibilities as trustee for tribal property.

In determining whether particular materials constitute "intra-agency" records in this type of situation, a reviewing court should focus on whether the interests of the relevant federal agency and the creator of the documents are sufficiently congruent that the private party may reasonably be consulted by the agency on the matter in a confidential manner. In its capacity as trustee, the United States owes a duty of loyalty to Indian Tribes, resulting from the unique legal relationship—emanating from the Constitution and congressional mandates and recognized for nearly two centuries by this Court—in which the United States holds the lands and associated resources of the Tribes in trust for their benefit. Because a Tribe's communications with the government concerning trust resources are integral to its "governmentally conferred capacity," *United States Department of Justice* v. *Julian*, 486

U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting) (see p. 5, *supra*), as beneficiary under that unique relationship, the requisite congruence of interests is inherent in the trust relationship and the functional test is satisfied. Indeed, a Tribe's "direct interest" in the trust property makes it a particularly appropriate "consultant" with respect to the government's performance of its trust responsibilities.

The District of Columbia Circuit confronted a similar question in *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (1997). In *Public Citizen*, the court of appeals held that Exemption 5 applied to communications between the National Archives and former President Bush, pursuant to the Presidential Records Act of 1978, 44 U.S.C. 2201 *et seq.*, concerning the appropriate disposition of the former President's records. 111 F.3d at 170-172. The court stated that "[c]onsultations under the Presidential Records Act are precisely the type that Exemption 5 was designed to protect." *Id.* at 171. It explained that an agency may sometimes require the assistance of outside experts and that "[t]he former President clearly qualifies as an expert on the implications of disclosure of Presidential records from his administration." *Ibid.*

The plaintiff in *Public Citizen* contended that under the "functional test," those communications were subject to disclosure because "the former President has a distinct and independent interest that makes him an adversary rather than a consultant." 111 F.3d at 171. The court acknowledged that "a former President's power to assert his rights and privileges * * * constitutes an independent interest." *Ibid.* The court held, however, that neither "[t]he existence of independent presidential interests," nor the possibility of future conflict between the former President and the Archivist, was sufficient to negate the consultative

relationship. *Ibid.* It observed in that regard that "[d]octors, lawyers and other expert advisors may find themselves in litigation as either plaintiffs or defendants against those whom they advise (e.g., breach of contract and malpractice claims), but for all that they are still consultants." *Ibid.*

Similarly here, the mere possibility that an Indian Tribe might be dissatisfied with the government's performance of its duties as trustee in a particular instance in the future should not obscure the basic congruence of interests that is inherent in the trust relationship. To the contrary, a Tribe—like the former President in *Public Citizen*—is an especially valuable and appropriate consultant in this setting because it "clearly qualifies as an expert on the implications of" the government's decisions regarding the management and protection of trust property. See 111 F.3d at 171. As the dissenting judge in the instant case explained, "[t]he mandated consideration that the Bureau and Department have to give to the Klamath Basin Tribes' claims virtually requires that they consult the Tribes, much as the Archivist consulted the ex-President, to seek their peculiar expertise concerning their rights." App., *infra*, 25a.

3. The court of appeals also stated that to permit withholding of the documents at issue in this case "would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the [DOI]." App., *infra*, 10a. That reasoning, too, is flawed.

a. The error in the court of appeals' analysis is particularly clear with respect to the documents pertaining to the Oregon adjudication. In that proceeding, the federal government is not the decisionmaker; its role is limited to the presentation of claims (on its own behalf and on behalf of Tribes) for ultimate resolution by state

officials. See *United States* v. *Oregon*, 44 F.3d at 764 (describing procedures to be employed in the state adjudication). As the dissenting judge explained, the court of appeals' analysis "fails to recognize * * * that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to 'resolve.'" App., *infra*, 23a n.4. Submissions intended to assist federal officials in their performance of representational functions before a state adjudicative body cannot sensibly be characterized as "ex parte communications."

Consistent with its trust obligation, the United States has historically represented the interests of the Tribes in disputes over their property and natural resources, including water rights. See, *e.g.*, *Winters* v. *United States*, 207 U.S. 564, 576 (1908) (noting that "[t]he Government is asserting the rights of the Indians"); *United States* v. *Powers*, 305 U.S. 527, 528 (1939); *Arizona* v. *California*, 373 U.S. 546, 595-601 (1963); *Colorado River Conservation Dist.* v. *United States*, 424 U.S. 800, 812-813 (1976); *Nevada* v. *United States*, 463 U.S. 110, 113, 116, 127 (1983). Effective representation in that setting requires the exchange of communications between federal and tribal officials in furtherance of the common purpose of protecting the Tribes' resources. Common law doctrine protecting exchanges of information between parties with a common interest in litigation "has been recognized in cases spanning more than a century." *United States* v. *McPartlin*, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 444 U.S. 833 (1979); see also *United States* v. *Schwimmer*, 892 F.2d 237, 243-244 (2d Cir. 1989);

United States v. *American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

The court of appeals' decision places the Klamath Tribes at a distinct disadvantage vis-a-vis other claimants in the Oregon adjudication. Under the court's ruling, the Tribes' communications to their representative (the United States) will be subject to compelled disclosure under the FOIA, without regard to the applicability of any traditional discovery privilege. Opposing claimants in the state proceeding, by contrast, may continue to assert all available privileges with regard to documents passing between them and their own representatives. This Court has "consistently rejected * * * a construction of the FOIA" that would permit the Act to "be used to supplement civil discovery." *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984). The court of appeals' unduly narrow construction of the term "intra-agency," however, will have precisely that effect.

b. The court of appeals' "ex parte communications" rationale is also erroneous with respect to the documents prepared in connection with the development of the KPOP. Like the documents related to the Oregon adjudication, those documents were submitted to (or, in one instance, prepared by) the agency in furtherance of the United States' performance of its trust responsibilities on behalf of the Tribes. That the federal government has additional duties with respect to the KPOP does not vitiate the government's duty *as trustee* to manage and protect tribal resources in accordance with fiduciary standards.

In *Nevada* v. *United States*, *supra*, this Court considered the preclusive effect of the judgment in a prior water rights adjudication in which the United States had claimed water rights for both the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project. See 463 U.S. at 113. The court of appeals in that case held that the prior judgment was not binding on the Tribe because the federal government had "compromised its duty of undivided loyalty to the Tribe" by representing competing interests in the earlier adjudication. *Id.* at 141. This Court disagreed, explaining that

> where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.

Id. at 142. The Court held that "the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the [prior] suit," notwithstanding the fact that both interests were represented by the United States in the earlier proceeding. *Id.* at 143. The Court thus recognized that the United States government's duty to consider and represent a variety of interests does not detract from its obligation as trustee to represent Indian Tribes and protect tribal property rights.

In the instant case, the documents pertaining to the KPOP were submitted to (or created by) the BIA in carrying out the United States' obligations as trustee for the tribal water rights potentially affected by the operation of the Klamath Project. The Court in *Nevada* v. *United States* observed that the government's trust obligations in its dealings with Indian Tribes "have been traditionally focused on the Bureau of Indian Affairs." 463 U.S. at 127; see also *id.* at 135-138 n.15;

Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968) (identifying the BIA as "the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States").

The fact that DOI must also take into account the interests of other water users in exercising ultimate decisionmaking authority with respect to the KPOP does not alter the duty of loyalty to the Tribes owed by the agency insofar as it is acting in its fiduciary role. The KPOP-related documents submitted by the Tribes were furnished to the BIA rather than to the BOR. That fact reinforces the conclusion that the documents, while assuredly relevant to DOI's performance of its ultimate decisionmaking responsibilities with respect to the KPOP, were provided to the Department *in its capacity as trustee.* The court of appeals failed to recognize that the limitation upon FOIA's overall goal of open government that the confidential trust relationship requires is simply an unavoidable consequence of the DOI's dual role as trustee for Indian Tribes and as federal policymaker. See *Nevada* v. *United States*, 463 U.S. at 127-128 (noting the DOI's often-conflicting responsibilities to act as trustee for Indian resources and to manage federal water reclamation projects); *Idaho* v. *Oregon*, 444 U.S. 380, 391 (1980) (referring to the United States' "role as trustee for the Indians" and "its role as manager of the ocean fishery and the dams"). Because the documents at issue here were submitted to (or created by) the government in its capacity as trustee, the court of appeals erred in analogizing those documents to "ex parte communications."

4. No other court of appeals has addressed the application of FOIA Exemption 5 to documents provided by Tribes to a federal agency for the purpose of assisting the government in the performance of its trust responsibilities.[6] Notwithstanding the absence of a circuit conflict concerning the status under Exemption 5 of tribal submissions to federal agencies, the question presented warrants immediate review by this Court.

The Ninth Circuit contains approximately 62% (28 million out of 45.5 million acres) of the lands held by the United States in trust for Tribes and individual Indians, and 400 of the 556 federally recognized Tribes are within that Circuit. In addition, approximately 67 of the 122 cases in which the United States is currently representing Tribes in litigation are within the territory covered by the Ninth Circuit. The practical impact of the court of appeals' decision is therefore very substantial even if trust property within the Ninth Circuit is considered in isolation. The decision can also be expected to disrupt the trust relationship between the BIA and Tribes and individual Indians whose lands and resources are in other areas of the country. The court of appeals' ruling will inevitably cast doubt on the BIA's ability to protect the confidentiality of tribal submissions bearing on the government's performance of its fiduciary duties, and it

---

[6] In *County of Madison* v. *United States Department of Justice*, 641 F.2d 1036, 1039-1041 (1981), the First Circuit held that several documents submitted by an Indian Tribe to the Department of Justice were not "intra-agency" records within the meaning of Exemption 5. The documents at issue in *County of Madison*, however, were submitted in connection with settlement negotiations concerning the Tribe's lawsuit against the United States. *Id.* at 1038. The First Circuit concluded that such documents could not appropriately be analogized to staff recommendations prepared within the agency, explaining that the Tribe's members "were past and potential adversaries, not coopted colleagues." *Id.* at 1040. The documents at issue in the instant case, by contrast, were submitted not in a setting marked by conflict between the Tribes and the United States, but "as part of a cooperative, consultative relationship mandated by Departmental policy and federal law." App., *infra*, 27a-28a (Hawkins, J., dissenting).

may thereby deter Tribes and tribal members from candidly expressing their views regarding the appropriate management of resources that the United States holds in trust for them.

Thus, while the court of appeals' decision is binding precedent only within the Ninth Circuit, the decision is likely to have a practical impact approaching that of a nationwide rule. The federal government cannot fulfill its fiduciary duties with respect to Indian trust resources without receiving candid, unfiltered information and assessments from the Tribes and individual Indians who hold the beneficial interest in those resources. In particular, in the course of litigation and negotiations concerning trust resources, the BIA and the Justice Department frequently ask Tribes to provide highly sensitive and privileged information regarding the Tribes' positions on relevant issues, as well as technical information supporting those positions. The public disclosure of tribal submissions will cause great damage to the United States' litigating and negotiating position in ongoing trust resources cases. Under the court of appeals' decision, Tribes will face a Hobson's choice: they may disclose important litigation or policy information to the trustee and face a substantial risk of public disclosure, or they may withhold from their own representative information that is necessary to the fully effective performance of the government's trust responsibilities. So profound and deleterious a change in the relationship between the United States and Indian Tribes should not be permitted to take effect without plenary review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

LEONARD SCHAITMAN
MATTHEW M. COLLETTE
Attorneys

MAY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 97-36208

KLAMATH WATER USERS PROTECTIVE ASSOCIATION, PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, DEFENDANTS-APPELLEES

[Argued and Submitted: March 3, 1999
Decided: Aug. 31, 1999]

Before: KLEINFELD and HAWKINS, Circuit Judges, and SCHWARZER,* Senior District Judge.

Opinion By Judge SCHWARZER; Dissent By Judge MICHAEL DALY HAWKINS.

SCHWARZER, Senior District Judge:

The question before us is whether documents submitted by Indian Tribes at the request of the Department of the Interior in the course of consultation over

---

* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

ongoing administrative and adjudicative proceedings involving water rights and allocations affecting the Tribes' interests are exempt under the Freedom of Information Act as "inter-agency or intra-agency memorandums or letters. . . ." 5 U.S.C. § 552(b)(5) (1994).

FACTUAL BACKGROUND

Klamath Water Users Protective Association (the "Association") brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, against the Department of the Interior (the "Department") and its constituent agency, the Bureau of Indian Affairs ("BIA"), *see* 25 U.S.C. § 1. The Association is a non-profit association of water users in the Klamath River Basin who receive water from the Klamath Project (the "Project"), a federal reclamation project administered by the Bureau of Reclamation ("Reclamation"), an agency within the Department. *See* 43 U.S.C. § 1457 (1994). Members of the Association, most of which are public agencies, such as irrigation districts holding contracts with Reclamation, receive water from the Project, as do the Klamath Basin Tribes. Those Tribes include the Klamath Tribes, with fisheries located near Upper Klamath Lake, and the Yurok, Hoopa Valley, and Karuk Tribes, with fisheries on the Klamath River. The former Tribes have demanded that the Department maintain high lake levels to protect their fisheries, while the latter Tribes have demanded increased releases to the Klamath River to benefit their downstream fisheries. The Tribes' demands, if satisfied, would lead to reduced water allocations to members of the Association and have been protested by Association members who fear water shortages and economic injury in dry years.

In 1995, Reclamation announced its intention to prepare a plan for long-term operation of the Project, the Klamath Project Operation Plan ("KPOP"). The purpose was to enable the Project to operate in conformity with the Department's various legal obligations in wet as well as dry years. The Department hired a consulting firm and held a series of meetings with interested parties. The meetings disclosed substantial disagreements among irrigation interests and the Tribes, leading the irrigation interests to fear that their water allocations would be cut. Although a draft KPOP was to be prepared for public comment in 1996, none has so far been released.

In connection with the development of the KPOP, the Department entered into an agreement with the Klamath Basin Tribes to provide consultation and cooperation to assist it in fulfilling its trust obligations. In a separate matter, the Department also filed claims on behalf of the Klamath Tribes in a water rights adjudication process established by the State of Oregon. This adjudication will quantify water rights, including those of the Klamath Tribes, in the Klamath River Basin.

The Association made several FOIA requests of the BIA for documents provided to or received from the Klamath Basin Tribes pertaining to water resources issues in the Klamath River Basin in order to discern what information was being exchanged during the preparation of the draft KPOP outside the public process. The Department released some documents, but withheld others. After the filing of this action, more were from time to time released and the Association withdrew its request for others. In the end only seven documents remained in dispute. They are listed in the

Vaughn index submitted by the Department and are described as memoranda provided by the tribes to the Department for use in the development of the KPOP, a memorandum from the Department concerning the government's trust obligations in developing the KPOP, and memoranda from the tribes to the Department addressing claims in the water rights adjudication.

The district court granted the Department's motion for summary judgment. Insofar as relevant to our disposition, the district court held that the documents "qualif[ied] as inter-agency or intra-agency documents under the 'functional test,'" citing *Formaldehyde Inst. v. Department of Health and Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989). It found that the documents "played a role in the agency's deliberations with regard to the current water rights adjudication and/or the anticipated Plan of Operations. Most of the documents were provided to the agency by the Tribes at the agency's request." The district court distinguished *Madison County v. Department of Justice*, 641 F.2d 1036 (1st Cir. 1981), on the ground that "the Tribes are not in current litigation with the government, but instead acted in the role of consultants" and that "[t]he government used all these documents in fulfilling their trust obligation, and as part of their decision making process." The Association appeals from the judgment. We have jurisdiction of this appeal under 28 U.S.C. § 1291 and reverse.

I. STANDARD OF REVIEW

Ordinarily, review of summary judgment is de novo. In FOIA cases, however, because of their unique nature, we have adopted a two-step standard of review. We first determine whether the district court had an adequate factual basis upon which to base its decision. If so, we review the district court's conclusion of an exemption's applicability de novo. *See Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). Some of our cases have applied the clearly erroneous standard to review of a district court's final determination of whether a particular document is exempt under the FOIA. *See, e.g., Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 807 (9th Cir. 1995); *Frazee v. United States Forest Serv.*, 97 F.3d 367, 370 (9th Cir. 1996); *Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d-1082, 1085 (9th Cir. 1997). As we explained in *Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996), application of that standard is appropriate in the common FOIA case where the district court's findings of fact effectively determine the legal conclusion. We recognized, however, that where the adequacy of the factual basis is not disputed, the district court's legal conclusion whether the FOIA exempts a document from disclosure is reviewed de novo. *See id.* This appeal raises no factual issues. The question presented, whether the fiduciary and consultant relationship between the Department and the Tribes qualifies the disputed documents under the FOIA's threshold inter/intra agency test, is one of law. Accordingly, our review is de novo.

II. APPLICATION OF THE FOIA

The FOIA "does not apply to matters that are—

. . .

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. . . ."

§ 522(b)(5). We must apply this exemption consistently with our holdings that the FOIA "'mandates a policy of broad disclosure of government documents.'" *Maricopa*, 108 F.3d at 1085 (quoting *Church of Scientology v. Department of the Army*, 611 F.2d 738, 741 (9th Cir. 1980)). When a request is made, an agency may withhold a document only if it falls within one of the nine statutory exemptions in § 522(b) and these exemptions "'must be narrowly construed' in light of the FOIA's 'dominant objective' of 'disclosure, not secrecy.'" *Id.* (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 48 L.Ed.2d 11 (1976)). "FOIA imposes on agencies the burden of proving that withheld materials are exempt from disclosure." *Id.*

The Department contends that the documents at issue, involving communications between the Tribes and the Department concerning the development of the KPOP and the Oregon water rights adjudication, meet the "functional test" of Exemption 5 for inter-agency/intra-agency communications. It rests its contention on the fact that to fulfill its fiduciary responsibility to protect and manage the natural resources of the Indian Tribes, it entered into a Memorandum of Agreement

with the Tribes acknowledging their consultative role in these two matters.

The Department places principal reliance on *Formaldehyde Inst. v. Department of Health and Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989). That case involved the application of Exemption 5 to a peer review letter received by the Centers for Disease Control ("CDC"), an agency within the Department of Health and Human Services, from a professional journal. The journal had reviewed a report submitted by an agency employee, determined not to publish the report, and then forwarded the peer review letter to the agency. The Formaldehyde Institute requested copies of all records of agency contacts with the journal relating to publication or rejection of the report. The agency rejected the request, relying principally on Exemption 5. The court of appeals reversed judgment for the Institute. Its opinion is largely devoted to determining that the peer review letter was predecisional and part of the deliberative process. But it also held that the peer review letter qualified under the inter-agency/intra-agency test. Quoting from its prior decision in *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1161-62 (D.C. Cir. 1987), which, in turn, relied on *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), it held that "'[w]hether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations.'" *See Formaldehyde*, 889 F.2d at 1118. In *Ryan*, the court had said that "[w]hen an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an

'intra-agency' memorandum for purposes of determining the applicability of Exemption 5." *Ryan*, 617 F.2d at 790. More recently, the court held that communications mandated by statute between the National Archives and former Presidents relating to access to their presidential records are within Exemption 5. *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168, 170-71 (D.C. Cir. 1997).

This court has not yet had occasion to address the reach of the inter-agency/intra-agency test under Exemption 5 and to determine whether the expansive interpretation adopted by the District of Columbia Circuit is consistent with the policy of broad disclosure on which the FOIA is anchored. We need not reach the issue here because this case differs in a material respect from those on which the Department relies. Here, the Tribes with whom the Department has a consulting relationship have a direct interest in the subject matter of the consultations. The development of the KPOP and the Oregon water rights adjudication will affect water allocations to the Tribes as well as those to members of the Association. While the Tribes and the Association may not be engaged in conventional adversary litigation, they assert conflicting claims in a contentious proceeding involving the Department. The documents at issue are relevant to those claims. Thus, this case differs from *Public Citizen, Inc. v. Department of Justice*, on which the Department relies, in that it presents not simply "the potential for an adversary relationship" but a clear and present conflict with respect to the subject matter of the documents, which is for the Department to resolve. *See* 111 F.3d at 171 ("At some point, of course, features of the other relationships (above all, a possible future adversary one) might come to eclipse the consultative relationship. . . .").

We have held that documents submitted to an agency by persons outside the government as part of an administrative proceeding are not internal agency documents exempt from disclosure. *See Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 984-85 (9th Cir. 1985) (affidavits describing union practices, officials and members submitted as part of an NLRB unfair labor practice investigation not within Exemption 5). The Department distinguishes the instant case on the ground that it had *requested* the advice of the Tribes. But that distinction makes no difference because, as *County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981), holds in a similar context, consultation with the tribes is not similar to "'the advice from staff assistants and exchange of ideas among agency personnel' that forms the object of exemption five," which exemption is limited to "inter-agency or intra-agency memorandums or letters." In *County of Madison*, the court held that communications between an Indian tribe and the Department of Justice in an unsuccessful effort to settle litigation between them did not qualify as inter-agency/intra-agency documents. It distinguished cases such as *Ryan* from the case before it in which, "by contrast, the Oneidas approached the government with their own interest in mind. While they came to parley, they were past and potential adversaries, not coopted colleagues." *Id.* While it is true that the Department requested the advice of the Tribes, the matters with respect to which it sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest, even if they incidentally

benefited the Department. Thus, we conclude that even were we to take an expansive view of the inter-agency/intra-agency test, these documents do not qualify for exemption.

To hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the Department. Rejection of such an extension does not conflict with the Department's fiduciary obligations to the Tribes. *See United States v. Cherokee Nation*, 480 U.S. 700, 707, 107 S. Ct. 1487, 94 L.Ed.2d 704 (1987). The Department exercises its regulatory powers in the context of the governing statutes; while it must act in the interests of the tribes, it may not afford them greater rights than they would have under the regulatory scheme. *See Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1303, 1308 (9th Cir. 1997). Indeed, the 1994 Presidential Memorandum directing the heads of all executive departments and agencies to consult with tribal governments prior to taking actions that affect them specifically, provides that "[a]ll such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals." 3 C.F.R. 1007 (1995). And a corresponding directive issued by the Secretary of the Interior in 1993 contains the identical mandate. *See* United States Dept. of the Interior, Protection of Indian Trust Resource Procedures app. Order No. 3175 (1993).

Because the documents fail to meet the threshold inter-agency/intra-agency test, we need not reach the other issues raised by the Association. The judgment is REVERSED.

REVERSED.

MICHAEL DALY HAWKINS, Circuit Judge, dissenting:

The majority, in an effort which marginally advances the cause of open government, winds up punishing entities the government has a fiduciary duty to protect. For the reasons that follow, I would affirm the judgment of the district court that the documents at issue should remain protected from the prying eyes of outsiders to the trust relationship between Native American Tribes and the Department of Interior.

We are asked here to review the district court's findings that these particular documents, in their entirety, are exempted from disclosure under the Freedom of Information Act ("FOIA") by FOIA's exemption five. Although, in its own words, the Bureau of Indian Affairs ("Bureau") and other Interior Department Agencies have provided it with "numerous documents" pursuant to its FOIA request, the Klamath Water Users Protective Association ("Association"), a non-profit corporation whose membership consists mainly of irrigation districts, continues to seek the release of these seven documents. Six of the seven documents in question were exchanged between the Bureau and the Klamath Basin Indian Tribes[1] ("Klamath Basin Tribes"

[1] The Klamath Basin Tribes include the Klamath Tribes, the Yurok Tribe, the Hoopa Valley Tribe, and the Karuk Tribe. Their interests are not always in accord, as the Tribes located near Upper Klamath Lake would prefer high levels of water in the Lake, and those located on the Klamath River would prefer high levels in the River to protect their respective fisheries, but they are generally adverse to the interests of irrigation districts—some of whom are members of the Association—who would prefer the waters be devoted to irrigation.

or "Tribes") in relation to consultation on the natural resource rights of the Klamath Basin Tribes in the Klamath River Basin in northern California and southern Oregon. The remaining document is a communication between the Department's Office of the Solicitor and a Tribe, in relation to an Oregon state proceeding in which the Department is mandated to press natural resources claims on behalf of affected Tribes.

The dispositive factor in this appeal, according to the majority, is that the Klamath Basin Tribes have a "direct interest" in the subject of their natural resource rights, and thus communications between the Tribes and the Interior Department can never fall within any reading of exemption five. In making the Tribes' "direct interest" the dispositive factor, however, I believe that the majority misreads and misapplies FOIA case law.

In deciding that these seven documents fail to meet the threshold "inter-agency/intra-agency" test for exemption from disclosure under exemption five, the majority never considers how the documents were employed in decision making. Fundamentally, the majority fails to recognize that the appropriate inquiry is an inquiry into the role a document plays in agency decision making, not into the identity of its producer. If this test were applied, I believe that the district court's conclusion that these documents are protected would be shown to be entirely correct.

Where the Bureau and Department are, by law, required to represent the interests of Indian Tribes, the majority's holding stands as a barrier to that representation. The majority implies that status as a federally recognized Indian Tribe, and the U.S. government's

trust responsibilities to the Tribes, create not a cooperative, but an adversarial relationship between the government and the Tribe, and thus FOIA can be used to destroy any opportunity for "open and honest" consultation between them. I have great respect for the majority and its author, but I simply cannot agree with a notion I think so fundamentally wrong.

FACTS

The Klamath Basin Tribes have natural resources rights tied to the waters of the Klamath River and Lake. *See, e.g., United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984) (Klamath Tribes). In the past, the Klamath Basin Tribes have asserted these water rights to protect two species of fish in the Upper Klamath Lake, and to benefit tribal fisheries in the California stretches of the Klamath River.

The United States government and its agencies have a clear trust responsibility to protect Tribal natural resources. *See United States v. Cherokee Nation*, 480 U.S. 700, 707, 107 S. Ct. 1487, 94 L.Ed.2d 704 (1987). Pursuant to Presidential and Departmental directives, all agencies within the Interior Department are required to "consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources." Department of the Interior, Departmental Manual: Part 512 American Indian and Alaska Native Programs, *Departmental Responsibilities for Indian Trust Resources* § 2.2 (1995). In spite of such consultation, the Tribes have not always agreed with the Bureau of Reclamation, an agency of the Interior Department, in its decisions allocating Klamath waters and at one point threatened to sue under the Endangered Species Act to protect fish.

The Bureau of Reclamation administers the Klamath Irrigation Project ("Klamath Project"), which uses the waters of the Klamath to irrigate over 200,000 acres in Klamath County, Oregon and two northern California counties, mainly for agricultural purposes. The Association's interest in the Klamath's waters springs from its membership which is composed in the main of irrigation districts who have entered into contracts with the Bureau of Reclamation to deliver water from the Klamath Project.[2] While the Bureau of Reclamation has obligations under the Reclamation Act and contract to these irrigators, it owes them not the slightest fiduciary duty, or obligation to assert their claims. *See Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L.Ed.2d 509 (1983) (finding obligations under Reclamation Act to project irrigators, but obligations to Indian Tribes grounded in trust responsibility); Filings of Claims for Water Rights in General Stream Adjudications, 97 Interior Dec. 21 (1989) (concluding that while United States is obligated to make filings in stream adjudications on behalf of project water rights to which it holds legal title, it is not required to make filings or present evidence on behalf of individual water users).

1. The Klamath Project Operation Plan

---

[2] The Association is not itself a contractor with the Klamath Project for water. Most of its members, however, are irrigation districts and other public agencies who contract with the Klamath Project for water allocations. The members then resell the water to private individuals and firms to irrigate commercial farming in Klamath County, Oregon and Modoc and Siskiyou Counties in California.

The triggering event for the Association's FOIA request was the 1995 announcement that the Department would be developing a long-term plan for operation of the Klamath Project, known as the "KPOP." Multiple agencies within the Department, including the Bureau of Reclamation, the Bureau of Indian Affairs, the Biological Resources Division, the National Marine Fisheries Service, and the Office of the Solicitor have been jointly involved in the process. Public meetings were held to allow public participation in the planning process, and were attended by Interior Department personnel, Tribal representatives, environmental groups, members of the Association, and state agencies.

Besides the public meeting process, the Department has also separately consulted with the Klamath Tribes on the operation plan as part of its obligation to protect the Tribes' trust resources whenever a potential impact on resources might occur. The Association has no legitimate role in this consultation. Nor was the fact of it hidden from these parties: it was made visibly apparent on an information sheet distributed to publicize the planning process. The Department and Tribes entered into a "Memorandum of Agreement for the Government-to-Government Relationship in the Development of the Klamath Project Operations Plan" ("Memorandum of Agreement") which formalized the consultation commitment, and allowed participation by the tribal governments in "planning and managing the trust resource base."

The Department has not yet completed the KPOP. A draft plan was produced in 1996, but never released.

2. The Oregon Water Rights Adjudication

The Bureau also represents some of the Klamath Tribes in Oregon state proceedings to adjudicate all claims to surface water in the Klamath River Basin in Oregon. These proceedings were initiated by the Oregon Water Resources Department pursuant to Oregon law. As well as asserting its own claims, the United States has an obligation to assert the rights of the Tribes. *See United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986). While these proceedings are not covered by the Memorandum of Agreement, the tribes have been extensively consulted in the process of determining the scope of the Tribes' water rights claims, and legal theories that could be advanced on their behalf. Other federal agencies have also filed water rights claims, as have private parties.

3. The FOIA Request

In 1996, the Association submitted FOIA requests to the Bureau seeking communications exchanged between the Bureau and the Tribes during the time period the draft KPOP was being prepared and reviewed. Unhappy with the information released by the Bureau, the Association filed this action seeking further disclosure pursuant to FOIA. In the course of the litigation, the Bureau released more documents, and the Association dropped its requests for others, leaving only these seven documents at issue.

Based on its findings regarding the role the documents played in agency deliberations, as well as on the consultative relationship that trust responsibilities and the Memorandum of Agreement established with the Tribes, the court below concluded that these seven documents fall within the exemption from disclosure provided by exemption five.

Document 3, FOIA Appeal 96-168, is a fax from the Klamath Tribes to the Bureau that contains a position paper on the water rights of the tribes. An affidavit from a Bureau employee stated that the Department had requested the position paper for use in departmental deliberations about the adjudication, and trust responsibilities in developing the KPOP. The court below found that disclosure would "discourage candid discussions within the Department" and "undermine the Department's ability to address water rights issues concerning the tribes."

Document 6, FOIA Appeal 96-168, is the only document from the Bureau to the Klamath Basin Tribes. It is a draft memo prepared by a Bureau employee that was circulated to two other Bureau employees and two Tribal attorneys proposing draft language to explain the Bureau's responsibilities for trust assets in the KPOP process. The court below found that the document was used pursuant to consultation with the tribes, relied upon in agency deliberations, and that disclosure would discourage inter-departmental discussion and harm the development of the operations plan.

Document 10, FOIA Appeal 96-168, is a fax from a Klamath tribal attorney to a Bureau employee expressing views on trust resources, especially fish. An affidavit by the Bureau employee receiving the fax established that he had requested the document and used it in his work preparing for the development of the KPOP. The court below again found that the document had been obtained pursuant to consultation with the tribes, relied upon by agency personnel in deliberations, and that disclosure would discourage inter-depart-

mental discussion and harm the development of the operations plan.

Document 16, FOIA Appeal 96-201, is a letter from a Klamath tribal attorney expressing views on the tribe's water rights claim in the adjudication. An affidavit from a Department employee established that the Office of the Solicitor asked for the information and used it to prepare for the water rights adjudication. The court below again found that the document had been obtained pursuant to consultation with the tribes, been relied upon by Departmental personnel in deliberations, and that disclosure would discourage inter-departmental discussion.

Document 20, FOIA Appeal 96-201, is also a letter from the Klamath Tribes to the Bureau concerning water rights, used to prepare for the water rights adjudication. The court below again found that the document had been obtained pursuant to consultation with the tribes, relied upon by the Bureau in its deliberations, and that disclosure would discourage inter-departmental discussion and harm the development of the operations plan.

Document 25, FOIA Appeal 96-201, is a letter from a Klamath tribal attorney to the Bureau on water rights that also includes a tribal resolution. Affidavits by Bureau employees again establish that this document was requested by the Bureau to assist in preparing for the water rights adjudication. The court below made the same findings in relation to this document as to the others, and also found that disclosure would "expose sensitive litigation positions" of the Department in the adjudication.

Document 27, FOIA Appeal 96-201, is a memo from a Klamath Tribes biologist to a Bureau employee discussing biological factors that may affect trust resources such as fish. Affidavits again establish that the Bureau requested and used this document to develop the KPOP. The court below made the same findings in relation to this document as to the others, and also found that disclosure would "expose technical opinions deemed critical to analyzing the extent of the Department's trust responsibility."

ANALYSIS

The Association argues that withholding these seven documents "unfairly and unduly disadvantage[s]" the Association and its members in their ability to participate in the KPOP process. The Department argues that the district court was correct in finding that the documents fall within FOIA exemption five as inter-agency or intra-agency communications, because the Tribes are in effect "consultants" to the Bureau on the issue of Tribal natural resource rights, and that releasing the documents would chill the agency's ability to make policy decisions.

The crucial question is the interpretation and applicability of exemption five to these documents, in these circumstances.[3] Exemption five exempts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). While, like all FOIA ex-

[3] As the majority explains, while our standard of review of summary judgments under FOIA is unsettled, this threshold determination is subject to de novo review as a question of law.

emptions, we narrowly construe exemption five, *see Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982 (9th Cir. 1985), we also recognize that it "incorporates the attorney-client privilege, the attorney work-product privilege, and the executive 'deliberative process' privilege that protects candid internal discussion of legal or policy matters." *Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1082, 1083 n. 1 (9th Cir. 1997).

In considering the applicability of the "deliberative process" privilege contained within exemption five—the privilege mainly at stake in this case—this court has usually found itself engaged in a two step process: (1) determining whether a document is "predecisional," and, if so; (2) determining whether it is "deliberative." *See, e.g., Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997); *Assembly v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992); *National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988); *Federal Trade Comm'n v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). In this instance, however, the majority's decision rests on a more basic challenge to the applicability of the exemption—a challenge to whether the documents in question are "inter-agency or intra-agency."

At first glance, the majority's decision that the documents—which no one disputes were exchanged between the Klamath Tribes and the Bureau—are not "inter-agency or intra-agency" documents seems entirely logical. The Klamath Tribes are not agencies of the federal government, and would probably strongly resist characterization as such.

Exemption five has not been so narrowly construed, however, by this court or by others. The purpose behind exemption five is the promotion of quality governmental decision making by allowing free and independent debate during the course of decision making, without exposure of intermediate opinions and recommendations to the "fishbowl" of public scrutiny. *See Environmental Protection Agency v. Mink*, 410 U.S. 73, 87, 93 S. Ct. 827, 35 L.Ed.2d 119 (1973). Since an agency will often rely on "opinions and recommendations of temporary consultants, as well as its own employees," *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), in its deliberative process, communications from these consultants, although not literally inter-agency or intra-agency can be "an integral part of [the agency's] deliberative process." *Id.* at 789-90. Thus, this circuit and others have recognized that documents created by outside consultants that otherwise qualify as deliberative, predecisional agency documents may also shelter within exemption five. *See Van Bourg*, 751 F.2d at 985 (stating that documents prepared by outsiders with formal relationships to agencies may fall within exemption five); *see also Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997); *Formaldehyde Inst. v. Department of Health and Human Serv.*, 889 F.2d 1118 (D.C. Cir. 1989); *Brockway v. Department of Air Force*, 518 F.2d 1184 (8th Cir. 1975); *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972).

In determining whether a document, or communication from an outside consultant is part of the "deliberative process" that exemption five is designed to protect, "the pertinent element is the role, if any, that the document plays in the process of agency deliberations."

CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987); *see also Formaldehyde Inst.*, 889 F.2d at 1123. The primary consideration is not the identity of the creator of the document, but "what harm, if any, the [document's] release would do to [the agency's] deliberative process." *Id.* This "functional test" covers circumstances "where an agency has 'a special need for the opinions and recommendations of temporary consultants,'" exempting documents with such information from disclosure under FOIA. *See State of Texas v. ICC*, 889 F.2d 59, 61 (5th Cir. 1990) (quoting *Hoover v. United States Dep't of the Interior*, 611 F.2d 1132 (5th Cir. 1980)).

The majority, however, holds that the seven documents here in issue can never fall within any reading of exemption five of FOIA, because the Klamath Basin Tribes have a "direct interest" in the water and natural resource rights to which the documents pertain. In my view, the majority errs in resting their decision on this "direct interest" and abandoning examination of the function of these documents within the Bureau's deliberative processes.

The majority believes the Tribes' "direct interest" in natural resource and water rights causes a conflict of interest that makes these documents function as tools of advocacy rather than consultancy. The majority is unclear, however, why this "direct interest" automatically disqualifies the documents for use in agency deliberations—whether the crux of the problem is conflict between the Tribes and the Association, or conflict between the Tribes and the Department. While the majority states at one point that the Tribes and the Association "assert conflicting claims in a contentious proceeding," they also state that these are "contested proceedings between the Tribes and the Department." [4]

Regardless of where the majority means to fix this "conflict," the function of these documents was to aid in departmental policy making, and the Tribes never exited their role of consultancy to become advocates. These documents are not advocacy, but the written record of an agency's consultation of a knowledgeable source, whose rights the agency is obligated to protect, in the process of making decisions as to how best to protect those rights.

If the majority believes that the Tribes' direct interest in natural resource and water rights is problematic because the Tribes and Association "assert conflicting claims in a contentious proceeding," the cases that the majority relies upon are inapposite. The existing case law, while relying on the role of the document in agency deliberations as the determinative factor, looks not at conflict between competing claimants before an agency, but at the existence of conflict between outside entities and an agency in trying to determine that role.

---

[4] If the majority means to characterize this case as the assertion by the Tribes and the Association of "conflicting claims in a contentious proceeding involving the Department" creating a "clear and present conflict with respect to the subject matter of the documents, which is for the Department to resolve," as a threshold matter, such a characterization fails to recognize or address that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to "resolve."

The "potential for an adversary relationship" raised in *Public Citizen*, 111 F.3d at 171, was not a potentially adversarial relationship between Public Citizen and the former President, but a potentially adversarial relationship between the former Presidents and the Records Agency that the court found remained consultative. *See id.* Nor did the *County of Madison* decision rest upon the adversarial relationship between the County and the Oneida, but upon the adversarial relationship—litigation—between the Department of Justice and the Oneida. *See County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981).

Moreover, this is not a case like *Van Bourg* where the agency is formally adjudicating a claim between two parties, and reviewing documents submitted by those private adverse parties to represent their positions in litigation, or a formal agency investigation. *See Van Bourg*, 751 F.2d at 985. Documents submitted in such circumstances would indeed have been submitted in response to "a mere request for information" by the agency to allow it to make a determination and could be viewed as advocacy, rather than being "a consultation or solicitation of expert advice . . . sought for the purpose of formulation of [agency] policy." *State of Texas*, 889 F.2d at 61. These documents were, instead, submitted at the request of the Bureau in order to allow it to formulate a position on the Klamath Basin Tribes' claims in the KPOP and the Oregon adjudication.

The majority argues that the Tribes' direct interest in their subject matter makes unimportant that the Bureau requested these documents from the Tribes. With the analysis properly focused on the function of

the documents, however, rather than on the identity of the consultant, the request shows that the Bureau and the Tribes were in a consultative, not adversarial relationship. Sharing proposed strategies, as several of the memos do, is not the action of parties in conflict.

If the majority means to argue instead that these are "contested proceedings between the Tribes and the Department," while this position would be in line with existing analysis of exemption five, the majority's analysis remains flawed. The Tribes and Bureau are not engaged in an adversarial relationship.

Rather than being distinguishable, *Public Citizen* is highly persuasive in establishing that exemption five does apply. *Public Citizen* directly rejects the majority's position that "a distinct and independent interest . . . makes [an outside entity] an adversary [to the agency] rather than a consultant." *Public Citizen*, 111 F.3d at 171. Much as the Klamath Basin Tribes have natural resource rights which the Bureau and Department have a duty to reconcile with other parties' claims to water, the ex-President has "rights and privileges" in records that the Archivist has to reconcile with duties to the public to make records available. *See id.* The mandated consideration that the Bureau and Department have to give to the Klamath Basin Tribes' claims virtually requires that they consult the Tribes, much as the Archivist consulted the ex-President, to seek their peculiar expertise concerning their rights, and how they wish to assert them in the KPOP and Oregon adjudication.

The affidavits from Department and Bureau employees, accepted by the court below, confirm that these communications spring from a relationship that

remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the expertise of the Tribes, rather than opposing them. Like the court in *Public Citizen*, which relied on a similar declaration by an Archives employee explaining that the communications with the ex-President were used to streamline the reconciliation of interests and ensure rapid resolution, I believe that the "[t]he existence of independent . . . interests provides no basis for doubting this explanation." *See id.* I would find that in these circumstances "the potential for an adversary relationship is not enough to negate one of consultation." *Id.* The communications between the Tribes and the Bureau are, as the affidavits explain, communications aimed at allowing Bureau employees to understand the Tribes' natural resource rights and formulate policy accordingly.

County of Madison, a fundamentally different case, does not stand as a barrier to the application of exemption five even under "an expansive view of the inter-agency/intra-agency test." There, the Oneida Tribe and the United States were engaged in adversarial litigation, and the documents the United States sought to withhold were documents related to litigation settlement negotiations. *See County of Madison*, 641 F.2d at 1036, 1041-43. In such a situation of direct adversity between an agency and an outside party, documents are outside of exemption five, especially where there is not a shred of deliberative process and participation. *Cf. Van Bourg*, 751 F.2d at 985; *State of Texas*, 889 F.2d at 61. The Bureau and the Klamath Tribes, in contrast, are not "past and potential adversaries" at this point—in many ways they have a relationship akin to that of attorney and client.

The majority ignores that the factor crucial to *County of Madison*'s holding was not that the Oneida had self-interest in mind in dealing with the Department of Justice, but that the documents in question were documents related to litigation in which the two were adversaries, rather than documents that the Department had requested to formulate policy, or assist in decision making. While the interests of the parties illuminate the function of the documents in *County of Madison*, *County of Madison* was decided on that function, not on the "selfishness" of the Oneida's motives.

As the First Circuit noted, "the line between supplicants and consultants may not always be clear." *County of Madison*, 641 F.2d at 1042. In this case, however, the Klamath Basin Tribes and Bureau relationship is consultative rather than self-seeking supplication. The relationship, as well as the documents here in question, are entirely different from those in *County of Madison*. These documents were not submitted in relation to litigation, but as part of a cooperative, consultative relationship mandated by Departmental policy and federal law.

Regardless of where the "conflict" is situated, or how we interpret prior case law, the crux of the majority's unease is that at some point the Department will have to balance the rights of the Tribes and those of the Association's members in allotting water in the KPOP. Thus, the majority perceives allowing these communications to be kept from disclosure under exemption five as, in some sense, allowing "ex parte" contact. In deciding this case on grounds prompted by that concern, however, the majority fails to recognize the impli-

cations of the relationship between the Department and the Tribes and the implications of its decision for that relationship.

This does not mean, as the majority argues, allowing the trust relationship would subvert FOIA and its goals. To the contrary, just as the fiduciary relationship between the Tribes and the government is not enough alone to justify blanket application of exemption five, *see Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (trust relationship, while creating fiduciary duties, does not extend to give tribes greater rights than others under general regulations and statutes); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997), neither should the fiduciary relationship be a barrier to the application of the exemption—the end result of the majority's decision—if the exemption's requirements are otherwise fulfilled. The main thrust of the memos quoted by the majority is to improve communications between the tribes and the government as a part of strengthening their unique relationship. The spirit behind that policy is not carried out when we not only fail to recognize that relationship, but use it to frustrate the use of this otherwise applicable FOIA exemption. I argue not for giving extra favoritism to the Tribes under an equally applicable law, but for the recognition of the consequences of a true distinction between their position and the positions of others vis-a-vis the Department in this matter.

The Department and Bureau are mandated to bring claims for, and protect the interests of the Tribes in a way that they are not required to act for the Association's members, or other parties interested in the outcome of the KPOP. The Bureau is not only the agency principally entrusted with relations with Indian Tribes in general, but in this situation it is mandated to present claims on behalf of the Tribes in both the adjudication and the KPOP proceedings. The Tribes' relationship to the Bureau, and Department, is akin to an attorney-client or fiduciary relationship. Far from being in conflict with the Tribes, the Bureau in many ways functions as the Tribes' advocate.

Because the Tribes and Association are not similarly situated with regard to the Department, what is occurring is not "ex parte contact." Acknowledging this difference in relationships in our analysis of this case would not mean granting the Tribes extra benefits under FOIA. FOIA does not require the release of these documents, as it might communications between the Association's members and the Department, because the Tribes have a formal consultative relationship and these documents are being used for predecisional, deliberative purposes. *See Van Bourg*, 751 F.2d at 985.

The majority's focus on "direct interest" rather than looking at the use, or function, of the documents is destructive in this context, where the Tribes and the Bureau are closely linked. This decision undermines the ability of the Bureau to fully understand and represent the Klamath Tribes in these two proceedings, without really adding much to the cause of freedom of information. There is no strong reason to chip away at that relationship in these circumstances.

It is important to remember that the Bureau, with whom all but one of these communications were exchanged, is not the final arbiter of water rights in either the KPOP or the Oregon adjudication. The Bureau is

only one agency of many involved in the formulation of the KPOP and in that process its role concentrated on safeguarding the interests of the Tribes within the broader scheme of the KPOP. No position that the Bureau alone takes is likely to be taken as a given in the KPOP, and accepted without dispute by the other agencies in the Department.

In the end, the Bureau's and the Department's final policy position will become public—both in the KPOP proceedings and the adjudication. The Association and all others interested will find out that decision at an appropriate time, when there will be a chance to challenge and discuss. The majority's decision, allowing the Association to leap-frog that process, gains little in the public exposure of information and loses much in terms of the ability of the Bureau to carry out its duty to protect the rights of the Tribes. Because of this, and because I believe that the proper inquiry in this case should have been an inquiry into the role the documents played in agency decision making, I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
PLAINTIFF

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;
UNITED STATES BUREAU OF INDIAN AFFAIRS,
DEFENDANTS

[Filed: Oct. 16, 1997]

ORDER

Magistrate Judge John P. Cooney filed Findings and Recommendation on June 19, 1997, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Cooney's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Cooney's Findings and Recommendation filed June 19, 1997, in its entirety. Defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

DATED this 16th day of October, 1997.

/s/ MICHAEL R. HOGAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
PLAINTIFF

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;
UNITED STATES BUREAU OF INDIAN AFFAIRS,
DEFENDANTS

[Filed: June 19, 1997]

FINDINGS AND RECOMMENDATION

COONEY, Magistrate Judge:

Plaintiff, Klamath Water Users Protective Association (KWUPA), brings this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Plaintiff seeks injunctive relief prohibiting defendants from withholding the requested documents, an order directing defendants to waive all fees for copies of requested documents, and reasonable attorney fees and costs. Defendants move for summary judg-

ment (#22). Defendants filed the documents in dispute with the court for in camera review.

I. FACTS

In making the following statement of facts, I view the facts in the light most favorable to the nonmoving party.[1]

KWUPA is a nonprofit corporation. (Solem declaration at 1). Most of its members are contractors of the Bureau of Reclamation, who receive water for irrigation through the Klamath Project facilities. (Id. at 1-2). Plaintiff does not conduct any commercial activities, and it does not use or distribute water from the Klamath Project. (Id. at 5). Most of its members are public agencies; primarily irrigation districts, but some are not contractors within the Klamath Project. (Id. at 2 and 6).

KWUPA provides information and representation for its members on matters in which they have a common interest, and to persons in the Klamath Basin in

[1] Plaintiff objects to defendants' evidence and related statements in defendants' reply memorandum. Plaintiff objects to page 5, first full paragraph; the court finds that this objection is well taken, and is reflected in the statement of facts. Plaintiff objects to page 14, the first full paragraph. The court finds that this statement is irrelevant, and denies this objection as moot. Plaintiff objects to page 17, the second full paragraph, arguing that the Scott-Brier declaration is insufficient to establish that this document was prepared by a tribal attorney. This objection is well taken; however, the defendants' Vaughn Index also states that this document was prepared by a tribal attorney, and plaintiff failed to object to this statement. Plaintiff objects to page 21, the first full sentence. This objection is well taken. Plaintiff objects to page 24, the second full paragraph. This objection is well taken.

general. (Id. at 6). It holds annual meetings, at which it presents information regarding activities and current developments regarding water resource issues in the Klamath River Basin. (Id.). It maintains a library of materials related to water resources, agriculture, and other resource issues in or affecting the Klamath Basin. (Id.). It makes information available to the public by participation in public or civic functions, such as booths at county fairs. (Id.).

Members distribute water to nearly 230,000 acres of land for irrigation in southern Klamath County, Oregon and northern Modoc and Siskiyou Counties in California. (Id. at 2). Most of the land is irrigated and farmed by private individuals or firms. (Id.). The major source of water for irrigation in the Klamath Project area is Upper Klamath Lake. (Id. at 2). Water is stored in the lake by operation of a dam, and is also diverted from the Lake through a large canal operated by Klamath Irrigation District. (Id.). Some water released from the dam is diverted for project irrigation, while other water flows into the Klamath River. (Id.). In the past few years, the Bureau of Reclamation and Department of Interior have stated that the water in the Klamath project must be managed, allocated, or reallocated to protect interests of various Indian tribes. (Id.).

In February of 1995, the Bureau of Reclamation announced that it planned to prepare a plan for long-term operation of the Klamath Project. (Id.). They wanted to develop a plan to operate the Klamath Project according to the various legal obligations of the Department of Interior. (Id.). In February of 1995, the Bureau of Reclamation stated that the Klamath Project

Operation Plan (KPOP) would be completed by March of 1996. (Id.).

The Department of the Interior held a series of meetings to discuss KPOP development. (Id. at 3). At the meetings, the Klamath Tribes advocated decisions for the management of water that would reallocate water used in the Klamath Project to instream uses. (Id.). Some tribes advocated high flows in the mainstream of the Klamath River, while other tribes advocated high lake elevations in the Upper Klamath Lake. (Id.).

The Department of the Interior hired a consultant, CH2M Hill, to assist in KPOP development. (Id.). CH2M Hill prepared technical papers which the public commented on. (Id.). The Bureau of Reclamation also engaged the U.S. Geological Survey to review technical information and arguments submitted by various parties, including the Tribes. (Id.).

In February of 1996, Mr. Ryan, an employee of the Bureau of Reclamation, informed Mr. Solem, the manager of the Klamath Irrigation District, that he had completed a draft plan for internal review by Department of Interior personnel. (Id. at 4). Mr. Ryan informed Mr. Solem that irrigators, tribes, or other persons outside the federal government would not have an opportunity to review the plan before a draft was publicly released. (Id.). A draft KPOP was never released to the public. (Id.). Bureau of Reclamation employees stated that they hoped to prepare a long term plan by sometime in 1999, although no specific schedule or completion date has been identified. (Id. at 5).

Steve Palmer of the Regional Solicitor's Office advised plaintiff's attorney that the Department of the Interior will file claims to water rights in the Klamath River system, in the Klamath River adjudication, on behalf of the Klamath Tribe. (Simmons Declaration at paragraph 4-5). Mr. Palmer has also advised Mr. Simmons that the Department of the Interior will file claims in the adjudication to assert and protect the irrigation water rights in the Klamath Project. (Id.). Mr. Palmer expressed the belief that any information submitted by irrigation interests related to the adjudication would be made available to the tribes or other parties upon request. (Id.). The Bureau of Reclamation has received and filled Freedom of Information Act (FOIA) requests from the tribes for correspondence, information, or materials provided to the Bureau by irrigation interests or the plaintiff. (Id.).

By letters dated February 27, March 18, March 26, and July 3, 1996, Paul S. Simmons, on behalf of KWUPA, addressed FOIA requests to several components of the Bureau of Indian Affairs (BIA), as well as the Office of the Assistant Secretary - Indian Affairs. (Defendants' Exhibit 9 at 1, 5-27). Mr. Simmons requested:

> "any writing or communication provided to or received from the Klamath Basin Tribes, or any evidence or record of any communication, written or verbal, involving the Klamath Basin Tribes . . . This includes, but is not limited to, any letter, memorandum, facsimile transmission, meeting notes or notes of telephone conversations or any other conversation, meeting attendance lists, telephone logs, or any document of any kind,

> regardless of authorship, provided to or received from the Klamath Basin Tribes, or any other document that is evidence of a communication with the Klamath Basin Tribes."

(Id. at 5, 7, 10, 13, 15, 18, 20, 22, 24, and 26). The term "Klamath Basin Tribes" was defined as "each of the Klamath Tribes, the Hoopa Tribe, the Karuk Tribes, the Yurok Tribe, and their members, officers, agents, attorneys, consultants, employees, and any other person communicating on behalf of the listed Indian tribes." (Id. at 5, 7, 9, 13, 15, 18, 20, 22, 24, and 26). Mr. Simmons also requested a fee waiver based on the organization's tax-exempt status. (Id. at 6, 8, 11, 14, 16, 19, 21, 23, 25, and 27).

In a letter dated June 25, 1996, the BIA responded to Mr. Simmons's requests of February 27, March 18, and March 26. (Id. at 29-35). The BIA released two documents in their entirety and one document in redacted form. (Id.). The June 25 letter stated that the BIA was withholding 17 responsive documents, as well as the redacted portions of Cathy Wilson's appointment book, based on deliberative process privilege and/or the attorney work-product privilege under FOIA exemption 5. (Id. at 29-31). The BIA denied Mr. Simmons's request for a fee waiver stating that: "We have determined that the information requested is primarily in the KWUA's commercial interest, based on the resource issues currently facing the organization in the Klamath Basin, and thus does not meet the statutory fee waiver test in section 2.21(a)(1)(ii). The KWUA's tax-exempt status is not determinative." (Id. at 34).

In a letter dated July 18, 1996, Mr. Simmons appealed this decision. (Defendants' Exhibit 9 at 2, 40-49). In

the appeal, Mr. Simmons stated that there was no basis for the BIA's finding that the request was for commercial purposes. (Id. at 48). The letter stated that: the Association was a nonprofit corporation with no commercial interests; the Association would not profit from the information; its members included public agencies; it provided information and resources directly and indirectly to several thousand people interested in the Klamath River; the information would be maintained in the Association's library; it would be available to any member of the public; and any member of the public who wished to review it would be able to learn about and understand the activities of the Department of the Interior. (Id. at 48-49).

On January 20, 1997, the Department issued a determination on the fee waiver issue presented in Mr. Simmons's administrative appeal of July 18, 1996. (Id. at 3). The Department denied the request for a fee waiver. (Id. at 67). The denial stated that it was the Department's opinion that the disclosure was not likely to contribute to the public's understanding of the operations or activities of the BIA. (Id. at 68). The Department found that the Association's focus pertained to the interest of a small segment of interested persons, as opposed to the general public, and that to qualify for a fee waiver the release of the requested materials had to contribute to the understanding of the public at large. (Id.). The Department found that the Association was seeking the information for its own use to evaluate the proposals of the BIA and the Klamath Basin Tribes concerning the Klamath Project Operations Plan. (Id.). The Department also found that the fact that the Association would maintain the materials in a library did not demonstrate that the Association was planning

to disseminate the material to the general public, and the Department was not aware of any interest in the material by the general public. (Id.). The Department also attached an opinion from the Office of the Solicitor further explaining the legal basis for the denial. (Id.).

In response to the FOIA request dated July 3, 1996, the BIA released eight documents in their entireties, and one document in redacted form. (Id. at 2, 37-38). Twenty items, as well as redacted portions of Cathy Wilson's appointment book, were withheld, based on the deliberative process privilege and/or the attorney work-product privilege. (Id.). One document was withheld based on the attorney-client privilege and the deliberative process privilege of FOIA exemption 5. (Id.). By letter dated August 3, 1996, the BIA denied Mr. Simmons July 3 request for a fee waiver. The August 3 letter stated that: "We have determined that the information requested is primarily in the KWUA's commercial interest, based on the resource issues currently facing the organization in the Klamath Basin. The KWUA's tax-exempt status is not determinative. Moreover, the request seeks materials informative primarily to a narrow segment of interested persons rather than the general public. Thus, we conclude that the request does not meet the statutory fee waiver test in 43 C.F.R. § 2.21(a)." (Id. at 37).

In an August 5, 1996 letter, Mr. Simmons appealed the denial. (Id. at 2). Mr. Simmons incorporated by reference his arguments in support of a fee waiver stated in his appeal dated July 18, 1996. (Id. at 51). On December 19, 1996, the Department denied Mr. Simmons's August 5, 1996 fee waiver appeal. (Id. at 3, 53).

The denial stated that it was the Department's opinion that the disclosure was not likely to contribute to the public's understanding of the operations or activities of the BIA. (Id. at 54). The Department found that the Association's focus pertained to the interest of a small segment of interested persons, as opposed to the general public, and that to qualify for a fee waiver the release of the requested materials had to contribute to the understanding of the public at large. (Id.). The Department found that the Association was seeking the information for its own use to evaluate the proposals of the BIA and the Klamath Basin Tribes concerning the Klamath Project Operations Plan. (Id. at 55). The Department found that the fact that the Association would maintain the materials in a library did not demonstrate that the Association was planning to disseminate the material to the general public, and the Department was not aware of any interest in the material by the general public. (Id.). The Department also attached an opinion from the Office of the Solicitor further explaining the legal basis for the denial. (Id.).

Plaintiff has narrowed the list of documents in dispute to twelve items. (Plaintiff's memorandum in opposition at 1). Plaintiff concedes that the Vaughn index and declarations justify withholding 13 documents describe as notes prepared by BIA personnel. Plaintiff no longer seeks the release of seven items which the Bureau of Reclamation produced. (Plaintiff's memorandum at 10). Defendants have released five[2] of

[2] Plaintiff requests that the court take judicial notice that these five documents were released. Plaintiff's request for judicial notice is granted.

the twelve items, leaving the following seven items in dispute:

1) A January 19, 1996, facsimile from Klamath Tribes Department of Natural Resources(DNR) to Cathy Wilson (BIA)(Identified as Document No. 3, FOIA Appeal No. 96-168) is a position paper that discusses water law legal theories concerning the water rights of the federally recognized Indian Tribes of the Klamath Basin. (Vaughn Index at 10). It involves and contains the Tribes' analyses as to matters relating to the adjudication and/or development of a long-term operations plan. (Defendants' Exhibit 1 at 4). The document was prepared by the Tribes and was provided to the Department at the Department's request for use by the Department in the performance of its official duties, including departmental deliberations concerning the adjudication issues and its trust responsibility in developing a long-term plan of operations. (Id. at 4-5; Supplemental; Wilson affidavit at 1).

Catherine E. Wilson, water rights specialist with the BIA, requested that Carl (Bud) Ullman, Klamath tribal counsel, provide her with a copy of this document. (Supplementary declaration of Catherine Wilson at 1). She used this document in her work concerning the development of an operations plan for the Klamath Project. (Id. at 2).

The Solicitor asked Bud Ullman, an attorney for the Klamath Tribes, to develop the position paper. (Vaughn Index at 11; Supplemental Bergstrom declaration at 3). Mr. Ullman prepared the document and shared it with the Department because of the common interest of the Tribes and the Department in protecting tribal resources in the development of an operation plan

for the Klamath Project, in potential litigation arising from the operations plan development, and in the pending adjudication in Oregon. (Vaughn Index at 11). The Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Id.). The Department relied upon the document in deliberations. (Id.). The document was created and used to assist the Department in deliberations and decision-Freedom of Information Act (FOIA) making regarding the ongoing adjudication and development of a long-term plan for the Klamath Project. (Defendants' Exhibit 1 at 5).

The document addresses issues related to water rights of the tribes at issue in both the ongoing development of an operations plan for the Klamath Project and the pending adjudication. (Vaughn Index at 11). The Department used the document in its case preparation in connection with the adjudication and in addressing its trust responsibility in developing a long-term operations plan for the Klamath Project. (Defendants' Exhibit 1 at 5).

The document predates the filing of water rights claims on behalf of the Klamath Tribes in the Klamath Basin Adjudication, which were due to be filed April 30, 1997, as well as the issuance of an operations plan for the Klamath Project. (Vaughn Index at 11). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, and thereby undermine the Department's ability to address water rights issues concerning the tribes. (Id.);

2) A January 24, 1996, draft memorandum from Cathy Wilson (BIA) to Tom Strekal and Doug Tedrick (BIA),

and Richard Cross, Yurok tribal attorney, and Bud Ullman, Klamath Tribal attorney, (Identified as Document No. 6, FOIA Appeal No. 96-168)[3] contains views on policy the BIA could provide to other governmental agencies concerning the obligation to protect Indian trust assets in developing an operations plan for the Klamath Project. (Id.). The memorandum considers proposing language as guidance regarding the trust responsibility. (Id.). The document satisfies exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Id.). The department relied upon the document in its deliberations. (Id.).

The memorandum predates the issuance of an operations plan. (Id.). The memorandum addresses issues related to the development of an operations plan for the Klamath Project. (Id. at 12). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, and thereby undermine the Department's ability to develop an operations plan. (Id.);

3) A February 8, 1996, facsimile from Bud (Carl) Ullman, Klamath tribal attorney, to Tom Strekal of the BIA (Identified as Document No. 10, FOIA Appeal No. 96-168) contains comments on the USFWS proposals for listed species. (Id.). This paper expresses views concerning trust resources in light of the USFWS's proposal on listed species and the resulting implication

[3] Plaintiff points out that this is the only document from the United States to the Klamath Tribes. All the other disputed documents are from the Tribes to the United States.

on lake management. (Id.). The facsimile cover sheet was released. (Id.).

Thomas A. Strekal, a fish and wildlife biologist with the BIA, requested that Mr. Ullman forward him a copy of this document. (Supplemental Declaration of Thomas Strekal at 1). He used this document in his work concerning the development of an operations plan for the Klamath Project. (Id.).

The document satisfies exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Vaughn Index at 12). The Department relied upon the document in deliberations. (Id. at 12-13). The document predates the issuance of a plan of operations, and it addresses issues related to the development of an operations plan for the Klamath Project. (Id. at 13). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, and thereby undermine the Department's ability to develop an operations plan. (Id.);

4) A May 23, 1996, letter from Bud (Carl) Ullman, Klamath tribal attorney, to Lynn Peterson, Regional Solicitor of the Pacific Northwest Region, (Identified as Document No. 16, FOIA Appeal No. 96-201) discusses the Klamath Basin Adjudication. (Vaughn Index at 18; Supplemental declaration of Barbara Scott-Brier at 1). It concerns the water rights claim being prepared on behalf of the Klamath tribes. (*Id.*). This document assisted the Department in its case preparation in connection with the water rights adjudication. (Supplemental declaration of Barbara Scott-Brier at 3). The letter satisfies exemption five because the Department con-

sults with the Klamath Tribes when departmental actions may affect trust resources. (Vaughn Index at 18). The Department relied upon the document in deliberations. (Id.).

The Office of the Solicitor asked Bud Ullman, an attorney for the Klamath Tribes, to develop the letter. (Id.; Supplemental declaration of Barbara Scott-Brier at 1). It was shared with the Department because of the common interest between the Tribes and the Department in protecting tribal trust resources in the pending adjudication in Oregon. (Vaughn Index at 18). The letter was prepared by the Tribe in consultation with and for use by the Department in the Department's deliberations concerning arguments to advance in the adjudication. (Defendants' Exhibit 4 at 3[4]). The Department used the letter in its case preparation in connection with the adjudication, and it was prepared at the recommendation of a Department employee. (Id.). The letter addresses issues related to the pending adjudication. (Vaughn Index at 18). It was provided to the Department prior to the Department filing its water rights claims on behalf of the Tribes in the adjudication. (Defendants' Exhibit 4 at 3). Disclosure of the letter would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, thereby undermining the Department's ability to address water rights

[4] Plaintiff objects to Ms. Scott-Brier's assertion that this letter was prepared by a tribal attorney. This fact only affects defendants' claim regarding attorney work-product doctrine. Even if the court were to strike this statement, it would still find that the materials were protected under the deliberative process exemption. In addition, defendants' Vaughn Index also states that this document was prepared by a tribal attorney.

issues concerning the tribes. (Vaughn Index at 18). Disclosure would expose sensitive litigation positions to be taken in the adjudication. (Id.);

5) A June 18, 1996 letter from Jeff Mitchell, Klamath Tribes Chairman, to Stan Speaks, BIA Area Director, with attachment (Identified as Document No. 20, FOIA Appeal No. 96-201) concerns the Klamath Tribes water rights. (Id. at 20). Ms. Scott-Brier, attorney-advisor for the Office of the Solicitor, requested that Mr. Mitchell, Chairman of the Klamath Tribes, send this letter and the attachment (Document No. 16, FOIA Appeal No. 96-201) to Mr. Speaks conveying the views of the Klamath Tribes concerning issues involved in the water rights adjudication. (Supplemental Declaration of Barbara Scott-Brier at 2). This document assisted the Department in its case preparation in connection with the water rights adjudication. (Id.). The letter satisfies exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Vaughn Index at 20). The Department relied upon the document in deliberations. (Id.). The document predates the filing of claims on behalf of the Klamath Tribe in the pending Oregon adjudication. (Id.). It addresses issues related to the water rights claims to be filed in the adjudication. (Id.). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, thereby undermining the Department's ability to address water rights issues concerning the tribes. (Id.). Disclosure would expose sensitive litigation positions to be taken in the adjudication. (Id.);

6) A June 28, 1996 letter from Bud (Carl) Ullman, Klamath tribal attorney, to Stan Speaks, BIA Area Director, with attachment (Identified as Document No. 25, FOIA Appeal No. 96-201) concerns a Klamath Tribal Executive Committee resolution regarding the Tribes' water rights claims in the Klamath Basin Adjudication. (Id.). Ms. Scott-Brier requested that Mr. Ullman send this letter and the attached tribal resolution to Mr. Speaks. (Supplemental Declaration of Barbara Scott-Brier at 2). This document assisted the Department in its case preparation in connection with the water rights adjudication. (Id. at 3). The attachment is the Klamath Tribes' resolution regarding the Tribes' water rights claims in the Klamath Basin Adjudication. (Vaughn Index at 20). The documents satisfy exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Id. at 21). The Department relied upon the documents in deliberations. (Id.). The documents predate the filing of claims on behalf of the Klamath Tribe in the pending Oregon adjudication. (Id.). They address issues related to the water rights claim to be filed in the adjudication. (Id.). Disclosure of the documents would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, thereby undermining the Department's ability to address water rights issues concerning the tribes. (Id.). Disclosure would expose sensitive litigation positions to be taken in the adjudication. (Id.); and

7) A July 1, 1996, memorandum from Jacob Kahn (Klamath Tribes) to Cathy Wilson (BIA)(Identified as Document No. 27, FOIA Appeal No. 96-201) concerns the biological factors affecting trust resources. (Id. at

22). The Department released a one page facsimile cover sheet that accompanied the memorandum. (Defendants' Notice of Filing of Fee Waiver Documents at 8). Catherine Wilson, water rights specialist with the BIA, requested a copy of this document from Jacob Kahn, tribal biologist. (Supplemental declaration of Catherine Wilson at 2). She used this document in connection with her work concerning the development of an operations plan for Klamath Project. (Id.). The document satisfies exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Vaughn Index at 22). The Department relied upon the document in deliberations. (Id.). The document predates the issuance of a plan of operations. (Id.). It addresses issues related to the development of an operations plan. (Id.). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, thereby undermining the Department's ability to develop an operations plan. (Id.). Disclosure would expose technical opinions deemed critical to analyzing the extent of the Department's trust responsibility. (Id.).

The remaining documents consist of communications between the Tribes and the Department. (Supplemental Bergstrom declaration at 2). They address the nature and extent of the Tribes' trust resources and the concurrent trust obligation owed by the Department to the Tribes in the development of an operations plan for the Klamath Project and in the pending adjudication of the Klamath River Basin. (Id.). Release of the documents would significantly harm the Department's position in the pending adjudication as well as the Depart-

ment's ability to complete its internal decision making regarding a more long-term Operations Plan for the Klamath Project. (Id.).

The documents contain recommendations, opinions, and frank discussions on various issues, including analyses of legal issues in the adjudication and/or operations plan development. (Id.). Release of the documents would reveal to the public, and to potential adversaries, the preliminary views and litigation strategy before the Department's policy and legal determinations on the matters have been finally determined. (Id.). Release would disrupt and chill the Department's ability to perform its required consultation with the Tribes as well as the Department's ability to complete its internal deliberations to determine its position regarding the nature and extent of the Tribes trust resources and the Department's trust responsibility. (Id. at 2-3).

Scott Bergstrom, attorney-advisor within the Office of the Solicitor, reviewed the documents at issue to determine if there were portions that were segregable. (Second Supplemental Bergstrom affidavit at 1-3). All segregable portions were released. (Id.). The factual information contained in the remaining documents is inextricably connected to the deliberative material, and disclosure would expose or cause harm to the BIA's deliberations. (Id. at 3).

The United States and the Department of the Interior have a trust responsibility to protect the rights and resources of the Indian Tribes. (Defendants' Exhibit 1 at 2). The documents submitted to the Department discuss issues regarding the Department's trust responsibility toward the Tribes in light of the development of a long-term operations plan for the Klamath Project and/or presently ongoing adjudication. (Id.).

It has been the policy and practice of the Department to consult with tribes when those rights and resources are impacted by federal actions. (Defendants' Exhibit 1 at 2, 9-10, 12-13, 15-16). Under the Departmental Manual, any information received from the tribes through the consultation process is "deemed confidential, unless otherwise provided by applicable law, regulations, or administrative policy, if disclosure of that information would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government (s)." (Id. at 13).

The Bureau of Reclamation, Fish and Wildlife Service, National Marine Fisheries Service, and the Bureau of Indian Affairs entered into a government-to-government agreement with the Klamath Basin Tribes regarding the development of the Klamath Project Operations Plan. (Id. at 18-23). Under the terms of the agreement, the Klamath Basin Tribes stands in the role of consultants to the Department on the issue of development of the Klamath Project. (Id. at 18, 20).

In connection with water rights claims filed by the United States on behalf of the Tribes and the development of a long-term operations plan for the Klamath Project, the Department entered into ongoing consultations with the Tribes to ensure that the Department would be fully informed of the Tribes' views and would have the Tribes' analysis available for decision making. (Id. at 3). The consultation involved discussion of legal analyses and theories regarding the scope of the water rights claims to be filed in the adjudication and

the manner in which the Department's trust responsibility affects the operations of the Klamath project. (Id. at 3-4).

In a memorandum dated September 26, 1994, James K. Bryant, an employee of the Bureau of Reclamation, noted that the Klamath Tribes were concerned that the water level of the Upper Klamath Lake was too low and the fish in the lake were in a stressful condition. (Simmons Declaration Exhibit B at 2). The Klamath Tribes wanted the Bureau of Reclamation to provide them with a water budget. (Id.). The Klamath tribes were "contemplating a lawsuit with Reclamation over Indian Trust and ESA (Endangered Species Act) responsibilities." (Id.).

In December of 1994, Marvin Garcia of the Klamath Tribe sent the Secretary of the Interior a letter requesting the reinitiation of formal consultation pursuant to section 7 of the Endangered Species Act and giving the Secretary the required 60-day notice of violation and intent to sue under the Endangered Species Act. (Simmons Declaration Exhibit C). The letter complained about the effect of the operation of the Klamath Irrigation Project by the Bureau of Reclamation on two endangered fish species that inhabited the Upper Klamath Lake. (Id.).

In September of 1996, Elwood Miller, Jr. of the Klamath Tribe sent the Secretary of the Interior a 60-day notice of intent to sue for violation of the Endangered Species Act. (Simmons Declaration Exhibit N). This letter also criticized the Bureau of Reclamation's management of the Klamath Project and its detrimental effect on the two endangered fish species inhabiting the lake. (Id.).

II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). The moving party bears the initial burden of proof. *See Rebel Oil Company, Inc. v. Atlantic Richfield Company*, 51 F.3d 1421, 1435 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 515 (1995). The moving party meets this burden by identifying portions of the record on file which demonstrates the absence of any genuine issue of material fact. *Id.*

In assessing whether a party has met their burden, the court must view the evidence in the light most favorable to the nonmoving party. *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th Cir. 1995). All reasonable inferences are drawn in favor of the nonmovant. *Id.* If the moving party meets their burden, the burden shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1567 (1996). The nonmoving party cannot carry their burden by relying solely on the facts alleged in their pleadings. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994). Instead, their response, by affidavits or as otherwise provided in Rule 56, must designate specific facts showing there is a genuine issue for trial. *Id.*

III. DISCUSSION

Defendants move for summary judgment arguing that the correspondence between the tribes and the BIA meets exemption (b)(5) as either deliberative process material, attorney work product material, and/or attorney client privilege material. Defendants argue that the BIA properly denied plaintiff's request for a fee waiver because the requests were unlikely to contribute to the public's understanding of the BIA's operations and activities. Plaintiff argues that: the documents withheld are not inter-agency or intra-agency documents; the deliberative process and/or attorney work-product privileges do not apply; the Department of Interior's trust obligation does not shield the documents from disclosure; the United States has failed to prove that it has disclosed all segregable material; and the United States wrongfully denied the fee waiver.

FOIA Exemption(5)

The Freedom of Information Act, 5 U.S.C. § 552 requires government agencies to disclose to the public any requested documents. 5 U.S.C. § 552(a). The government agency must disclose the document unless it falls within one the nine enumerated exemptions found in 5 U.S.C. § 552(b). *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1082, 1085 (9th Cir. 1997) (citation omitted). Theses nine exemptions are "explicitly exclusive" and "narrowly construed." *Id.* (citations omitted). "FOIA 'does not authorize withholding of information or limit the availability of records to the public, except as specifically stated'." *Id.* at 1087 (citing 5 U.S.C. § 552(d)).

FOIA creates a presumption in favor of disclosure. *Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State*, 818 F. Supp. 1291, 1295 (N.D. California 1992). The government agency has the burden of proving that the requested document falls within one of FOIA's exemptions. *Maricopa Audubon Society*, 108 F.3d at 1085 (citing 5 U.S.C. § 552(a)(4)(B)). To meet that burden, the agency must present oral testimony or affidavits that are detailed enough for the court to assess the government's claim of exemption. *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1089, 1092 (9th Cir. 1997). The agency may also compile a "Vaughn Index." *Maricopa Audubon Society*, 108 F.3d at 1092.

If the agency relies on affidavits, the affidavits must contain a reasonably detailed description of the documents and allege facts sufficient to establish the exemption. *Id.* In the affidavits or the Vaughn Index, the agency must describe each document, or portions withheld, discuss the consequences of disclosing the sought after information, discuss segregability, and discuss whether the material was relied upon in making a decision. *See Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State*, 818 F. Supp. 1291, 1296-1297 (N.D. Cal. 1992). "The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *Id.* (citation omitted).

Exemption 5 exempts from disclosure any "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C.

§ 552(b)(5). Exemption 5 "shields documents 'normally privileged in the civil discovery context'" which "incorporates the attorney-client privilege, the attorney work-product privilege, and the executive 'deliberative process' privilege that protects candid internal discussion of legal or policy matters." *Maricopa Audubon Society*, 108 F.3d at 1084 fn.5 (citations omitted). It "does not apply to factual information, unless the release of the factual information would reflect or reveal the deliberative process, or to recommendations or opinions ultimately relied upon in subsequent agency action." *Bay Area Lawyers*, 818 F. Supp. at 1297 (citation omitted).

Deliberative Process

Defendants argue that the Tribes were acting in the role of consultants with regard to the documents in question, and therefore, under the "functional test" articulated in *Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d 1118 (D.C. Cir. 1989) and various other cases, the documents are protected under the deliberative process privilege. Defendants distinguish *Madison County, New York v. Department of Justice*, 641 F.2d 1036 (1st Cir. 1981), arguing that the Tribes in this case were not acting in an adversarial role and were not in active litigation with the government, but instead were acting as consultants. Defendants argue that the potential for an adversarial relationship does not negate the consultative relationship, citing *Public Citizen, Inc. v. Dept. of Justice and National Archives and Records Administration*, 1997 WL 191110 (D.C. Cir.) at *4. Defendants argue that: the consulting relationship assisted the government in fulfilling its trust obligations toward the

Tribes; consulting was undertaken pursuant to Executive and Departmental policy, the Tribes participation assisted them in making decisions concerning the development of the Operations Plan and preparing of water rights claims in the Oregon stream adjudication; and the documents originating with the Tribes were provided at the Department's request. Defendants argue that the court in the *County of Madison* recognized that the situation is an entirely different matter when the government approaches a third party to obtain information for the benefit of the agency.

Plaintiff argues that under *County of Madison* the documents in question do not qualify as inter-agency or intra-agency documents. Plaintiff argues that: the Tribes approached the government with their own interests in mind; they aggressively advocated the reallocation of water to benefit them; they've made political overtures to the Office of the Secretary; they've threatened to file lawsuits; they've prepared technical reports; they've demanded that irrigation diversions be shut off; and they've combined their advocacy with environmental groups.

The deliberative process privilege allows agencies to "freely explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Assembly of the State of California v. United States Department of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). "In order to be protected by the deliberative process privilege, such a document must be both 'predecisional' and 'deliberative'." *Id.* (citation omitted). The deliberative process privilege was created "to protect the deliberative process of government, by ensuring that persons in an advisory role would be able to

express their opinions freely to agency decision-makers without fear of publicity." *Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (citation and quotations omitted).

The privilege encompasses the opinions and recommendations of temporary consultants, as well as its own employees. *Id.* "[E]fficient government operation requires open discussions among all government policymakers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects." *Id.* (citation and quotations omitted). Under the deliberative process privilege, the terms "'inter-agency' and 'intra-agency' are not rigidly exclusive terms, but rather embrace any agency document that is part of the deliberative process." *Id.* at 1123 (citation and quotations omitted).

"Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If information communicated is deliberative in character, it is privileged from disclosure, notwithstanding its creation by an outsider." *Id.* (Citation and quotations omitted).

A document is deliberative "if the disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Maricopa Audubon Society*, 108 F.3d at 1093. (Citation and quotations omitted). This test focuses on the effect of releasing the documents. *Id.* at 1094. The court must examine what harm, if any, the release of the document would do to

the agency's deliberative process. *Formaldehyde Institute*, 889 F.2d at 1122. The court determines whether disclosure would be "likely in the future to stifle honest and frank communication within the agency." *Maricopa Audubon Society*, 108 F.3d at 1094 (citation and quotations omitted). The court also looks at the context in which the materials were used or what role they played in the deliberative process. *Formaldehyde Institute*, 889 F.2d at 1124.

The court finds that all the documents in question qualify as inter-agency or intra-agency documents under the "functional test". All the documents played a role in the agency's deliberations with regard to the current water rights adjudication and/or the anticipated Plan of Operations. Most of the documents were provided to the agency by the Tribes at the agency's request. Disclosure of these documents would expose the agency's decision-making process and discourage candid discussion within the agency undermining the agency's ability to function. (Vaughn Index at 11, 12-13, 18, 20-21; Defendants' Exhibit 1 at 5; Defendants' Exhibit 4 at 3-4; Supplemental Bergstrom affidavit at 2-3).

The court finds that *Madison County* is distinguishable from this case. In our case, the Tribes are not in current litigation with the government, but instead acted in the role of consultants. Most of the documents were provided to the government at their requests. The government used all these documents in fulfilling their trust obligation, and as part of their decision making process. The court finds that the fact that the Tribes may, in the future, become potential litigants does not change their current status as consultants

acting in cooperation with the agency. *See Public Citizen, Inc. v. Dept. of Justice and National Archives and Records Administration*, 1997 WL 191110 (D.C. Cir.) at *4.

Defendants argue that the documents are predecisional and deliberative. They predate any decision on the Plan of Operations for the Klamath Project and the final decision on the position of the United States in the stream adjudication. Disclosure of the documents would expose the Department's decision making process with regard to the development of the Plan of Operations, and it would expose the development of the Department's legal position in the ongoing adjudication on behalf of the Tribes. Release of the documents would inhibit the ability of the Department and the Tribes to communicate freely and openly.

Plaintiff argues that the documents are not predecisional because there is no definite date for completion of the Plan of Operation, no definite schedule for completion, and no written work schedule. Plaintiff argues that the defendants have failed to demonstrate how and why disclosure of the documents could adversely expose the decision making process.

"A predecisional document is one prepared in order to assist an agency decision-maker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Maricopa Audubon Society*, 108 F.3d at 1093 (citation and quotations omitted). "[T]he agency must identify a specific decision to which the document is predecisional." *Id.* at 1094. Material which predates a decision chronologically, but did not contribute to the decision, is not predecisional. *Assembly of the State of California v. United States Department of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992). Material which may be used in making a possible decision at some undisclosed time in the future does not qualify as predecisional material. *Id.* (citation omitted).

Document No. 3 FOIA Appeal No. 96-168, Document No. 16 FOIA Appeal No. 96-201, Document No. 20 FOIA Appeal No. 96-201, and Document No. 25 FOIA Appeal No. 96-201 predate the Department's decision regarding the filing of water rights claims on behalf of the Tribes in the ongoing adjudication. (Defendants' Exhibit 1 at 5, Vaughn Exhibit at 18 and 21). These documents were relied upon in deliberations regarding the Department's decision to file claims in the adjudication. (Id. at 11, 12-13, 18, 20-21; Defendants' Exhibit 1 at 5). Document No. 6 FOIA Appeal No. 96-168, Document No. 10 FOIA Appeal No. 96-168, and Document No. 27 FOIA Appeal No. 96-201 predate the Department's release of a Plan of Operations for the Klamath Project which is scheduled for completion and release in 1999. (Vaughn Index at 11, 13, 21). These documents were relied upon in the Department's deliberations. (Id. at 11, 12-13, 21). Based on these facts, the court finds that these documents are predecisional.

Attorney Work Product

Defendants argue that document No. 3, FOIA Appeal No. 96-168 and document No. 16, FOIA Appeal No. 96-201 are protected by the attorney work-product exemption. Defendants argue that these documents were prepared by an attorney for the use of the Solicitor's

Office in his deliberations in contemplation of litigation in the ongoing stream adjudication and the development of the Plan of Operations and at the request of Department attorneys. Defendants argue that the attorney work-product privilege applies to the entire document because the analysis is inextricably linked to the Department's legal strategy in the adjudication.

Plaintiff argues that the BIA must prove that the documents in question were prepared by an attorney in contemplation of litigation and explain why the privilege applies to all portions of the document. Plaintiff argues that document No. 3 FOIA Appeal No. 96-168 and document No. 26 FOIA Appeal No. 96-201 were not prepared by an attorney, and that Bergstrom's assertion that document No. 26 was prepared by Bud Ullman is not based on personal knowledge. Plaintiff argues that the description of these documents is inconsistent, and that to the extent that the documents relate to an ongoing administrative process and an anticipated administrative decision, they are not prepared in anticipation of litigation.

Exemption 5 permits the withholding of memorandums and letters which would not be available by law to a party other than an agency in litigation. *Church of Scientology International v. United States Department of Justice*, 30 F.3d 224, 230 (1st Cir. 1994). This exemption includes the attorney work-product privilege. *Maricopa Audubon Society*, 108 F.3d at 1084 fn.5 (citations omitted). The privilege applies to memorandum, prepared by an attorney or under the direction of an attorney, in contemplation of litigation, which sets forth the theory of the case or the litigation strategy. *Exxon Corp. v. Dept. of Energy*, 585 F. Supp. 690, 700

(D.D.C. 1983); *Exxon Corp. v. Federal Trade Commission*, 466 F. Supp. 1088, 1099 (D.D.C. 1978), *affirmed*, 663 F.2d 120 (D.C. Cir. 1980). "An agency seeking to withhold a document in its entirety under this exemption must identify the litigation for which the document was created and explain why the work-product privilege applies to all portions of the document." *Church of Scientology*, 30 F.3d at 237. "For a document to have been prepared in contemplation of litigation, at the very least, some articulable claim, likely to lead to litigation, must have arisen." *Dept. of Energy*, 585 F. Supp. at 700 (citation and quotations omitted). "[A]dministrative litigation certainly can beget court litigation and may in many circumstances be expected to do so." *Id.* A document that was created for the primary motive of assisting in pending or impending litigation is protected by attorney work-product privilege. *See United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temporary Emergency Court of Appeals 1985). The work-product privilege still applies where the information has been shared with a third party that holds a common interest. *See Durham v. United States Dept. of Justice*, 829 F. Supp. 428, 433 (D.D.C. 1993), *appeal dismissed*, 1994 WL 704043 (D.C. Cir. 1994).

Document No. 3 FOIA Appeal No. 96-168 was prepared by Bud Ullman, an attorney for the Klamath Tribes, at the request of the Solicitor, an attorney for the government. (Vaughn Index at 11). The memorandum discusses legal theories concerning the water rights of the Tribes that are being asserted in the current state administrative adjudication of water rights to the Klamath River. (Id.). Release of this document would significantly harm the government's position in the ongoing adjudication, and would reveal to potential

adversaries the preliminary views and litigation strategy. (Supplemental Bergstrom declaration at 2). The document was prepared in anticipation of potential litigation that may arise out of the administrative adjudication or over the forthcoming Plan of Operations for the Klamath Project. (Vaughn Index at 11). Plaintiff has admitted that the issue of water rights has been and continues to be very contentious. (Plaintiff's memorandum at 3-6). It appears that the current administrative adjudication and the upcoming Plan of Operations are expected to spawn court litigation. Based on the above facts, the court finds that this document in its entirety is protected by the attorney work-product privilege.

Document No. 16 FOIA Appeal No. 96-201 is a letter composed by Bud Ullman a Klamath Tribe attorney. (Vaugh Index at 18). It concerns the Plan of Operations and the current water rights adjudication. (Id.). The Office of the Solicitor requested that Mr. Ullman prepare the letter. (Id.). It discusses arguments that were going to be advanced in the current water rights adjudication. (Defendants' Exhibit 4 at 3). Release of this document would significantly harm the government's position in the ongoing adjudication, and would reveal to potential adversaries the preliminary views and litigation strategy. (Supplemental Bergstrom declaration at 2). It was prepared in anticipation of potential litigation that may arise out of the administrative adjudication. (Defendants' Exhibit 4 at 3-4). Plaintiff has admitted that the issue of water rights has been and continues to be very contentious. (Plaintiff's memorandum at 3-6). It appears that the current administrative adjudication and the upcoming Plan of Operations are expected to spawn court litigation.

Based on the above facts, the court finds that this document in its entirety is protected by the attorney work-product privilege.

Segregability

Plaintiff argues that defendants have failed to prove that they disclosed all segregable material. Defendants argue that the Department has reviewed all the documents at issue to determine whether there are any reasonably segregable portions and that the cover sheets and other portions of the documents which could be disclosed without revealing the agency's deliberations or legal strategies were released.

Even if part of a document is exempt, the agency must disclose any segregable portions, and it must address, in the Vaughn Index or affidavits, why the remaining information is not segregable. *Bay Area Lawyers*, 818 F. Supp. at 1296. The court must make a specific finding on the issue of segregability, and the court cannot approve the withholding of the entire document without making a finding on segregability. *Id.* (citation omitted).

Scott Bergstorm, attorney-advisor within the Office of the Solicitor, reviewed the documents at issue to determine if there were portions that were segregable. (Second Supplemental Bergstorm affidavit at 1-3). All segregable portions were released. (Id.). The factual information contained in the remaining documents is inextricably connected to the deliberative material, and disclosure would expose or cause harm to the BIA's deliberations. (Id. at 3). Based on this evidence, defendants' motion for summary judgment with regard to the issue of segregability should be granted.

Fee Waivers[5]

5 U.S.C. § 552 (a) (4) (iii) provides that documents are to be furnished without charge or at a reduced rate if the disclosure is likely to contribute significantly to the public's understanding of government operations or activities, and the disclosure is not primarily in the commercial interest of the requester. *McClellan Ecological Seepage Situation (MESS) v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). The fee waiver statute "is to be liberally construed in favor of waivers for non-commercial requesters". *Id.* (citation omitted). The main purpose of this provision "was 'to remove the roadblocks and technicalities which have been used by various federal agencies to deny waivers or reductions of fees under FIOA'". *Id.* (citation omitted)

Defendants argue that plaintiff is seeking the information for its own use. Plaintiff has failed to demonstrate that disclosure of the information is in the public interest and that it will contribute to public's understanding of the operation or activity. Defendants argue that the plaintiff's pledge to maintain the information in its library is insufficient to demonstrate that the information will be communicated to the public. Defendants argue that plaintiff has failed to provide specific information establishing that it is entitled to a fee waiver.

Plaintiff argues that the defendants wrongfully denied its request for a fee waiver because the withheld documents are likely to contribute to the public's

[5] In an action by a requester regarding a fee waiver under 5 U.S.C. § 552, the standard of review is de novo, and the court's review is limited to the record before the agency. 5 U.S.C. § 552 (a) (4) (vii).

understanding of the Department's operation the Klamath Project and related activities. Plaintiff argues that it made the required prima facie showing to be entitled to a fee waiver. Plaintiff argues that disclosure of the information is in the public interest and is not primarily in its commercial interest.

The requester of a fee waiver has the initial burden of identifying the public interest to be served by disclosure of the documents. *Id.* at 1285 (citation omitted). "[A]n agency may infer lack of substantial public interest 'when a public interest is asserted but not identified with reasonable specificity, and circumstances do not clarify the point of the requests'". *Id.* (citation omitted). Requesters must explain with reasonable specificity how disclosure will contribute to public understanding. *Id.* Conclusory statements of public interest will not suffice. *Id.*

In *MESS*, the request for a fee waiver provided the following information: the requesters sought to benefit the general public, especially in Sacramento; the information might be used in litigation to ensure agency compliance with federal laws; and the information would be donated to a public institution. *Id.* The court found that the "requesters do not explain with reasonable specificity how disclosure will contribute to public understanding." *Id.*

In evaluating the request, the court found that: although the information sought was not new, it could support oversight of agency operations; disclosure of the information would result in only limited public understanding; the requesters gave no indication of their ability to understand and process the information; the record did not reveal whether the requesters had a

history of disseminating such information, either through public lawsuits or other means; the requesters gave no details about their intention to disseminate the information; the requesters did not state on what basis they would ensure agency compliance with particular federal laws or regulations; and the requesters failed to name a public institution to which they might donate the information. *Id.* The court found that an organization's identity and history, ability to absorb and disseminate information, and specific plans to use the information are all relevant to the assessment of whether disclosure is likely to contribute significantly to the public's understanding. *Id.* at 1287.

In *ONRC v. BLM*, 92-6425-TC (D. Oregon 1994 - Order dated April 22, 1994), the original request for a fee wavier stated: "ONRC is a nonprofit, tax-exempt Oregon corporation and has been determined to be operating in the public interest by the US Departments of Agriculture, Interior, Treasury, and Postal Service." *ONRC*, slip opinion at 2. The administrative appeal stated:

> "All of the information requested will be shared with ONRC's members or other members of the public that may express an interest to us in reviewing this information.
>
> ONRC, a 501(c) (3), nonprofit, tax-exempt corporation, is the coordinating structure for conversation, sportsmen, education, outdoor recreation, and commercial organizations concerned about Oregon's lands, waters, and natural resources. Organized in 1972 and incorporated in 1974, ONRC is a statewide association of 90 member organizations and more than 3000 individual members. ONRC educates the

> public about natural resource values and works to provide for effective public involvement concerning natural resource related issues and concerns.
>
> ONRC clearly meets these criteria and has been determined to be operating in the public interest by the U.S. Departments of Agriculture (Forest Service), Interior (Bureau of Land Management and National Park Service), Treasury (Internal Revenue Service), and the U.S. Postal Service.
>
> ONRC requests this information as being necessary to assist us in the evaluation of road construction practices and forest planning in these districts. The disclosure of this information will therefore 'likely contribute to an understanding of government operations or activities' and contribute 'to an understanding of the subject by the general public.'
>
> The subject of this request clearly concerns government activities. Disclosure of the requested information will (in particular) contribute significantly to the public understanding of the possible impact of road construction in and around these Districts, as well as the possibility of gaining information about the forest management practices of the Bureau of Land Management. *Id.* at 3.

Judge Hogan found that the request "does not sufficiently specify why plaintiff is requesting the documents or how the purpose of the request is in the public interest. The general purposes identified in plaintiff's appeal do not significantly expand on what the BLM is already directly providing to the public." *Id.* at 4. Judge Hogan stated that "plaintiff should more specifically identify a public interest not already sufficiently

served or capable of accomplishment under the status quo", and "plaintiff should demonstrate specifically how obtaining the specific documents will contribute to the public understanding of the operations of the government." *Id.* He also required plaintiff to identify the area, scope, aspect, or practice in a narrow rather than expansive way. *Id.*

Under the standards set forth in *MESS* and *ONRC v. BLM*, plaintiff has provided insufficient information to meet its prima facie burden of showing eligibility for a fee waiver. Plaintiff gave no indication of its ability to understand and process the requested information. There is no indication that the plaintiff has a history of disseminating information. The only detail given with regard to dissemination was that the information would be kept in a library where the public would have access. The plaintiff gave no details on how it planned to use the information or how the request was in the public interest. Since plaintiff has failed to make a prima facie showing of eligibility, defendants are entitled to summary judgment on the fee waiver claim. *See Friends of the Coast Fork v. United States Department of the Interior*, ___ F.3d ___, 1997 WL 149255 (9th Cir.) At *2.

IV. RECOMMENDATION

Based on the foregoing, it is recommended that defendants' motion for summary judgment be granted.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have ten days from

the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

Dated this 19 day of June, 1997.

/s/ JOHN P. COONEY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-36208
D.C. No. CV-96-03077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;
BUREAU OF INDIAN AFFAIRS, DEFENDANTS-
APPELLEES

[Filed: Dec. 22, 1999]

ORDER

Before: KLEINFELD, HAWKINS, Circuit Judges, and SCHWARZER,[1] District Judge.

Judges Kleinfeld and Schwarzer have voted to deny appellee's petition for rehearing. Judge Hawkins voted to grant the petition for rehearing. Judge Kleinfeld has voted to deny the petition for rehearing en banc and Judge Schwarzer so recommends. Judge Hawkins voted to grant the petition for rehearing en banc.

---

[1] The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc is DENIED.